No. 05-999

In The
Supreme Court of the United States

HOUSTON COLLINS, JR.; SHARLET BELTON COLLINS; ROBERT EARL COLLINS; VELMA JEAN COLLINS; DARRELL CALENDER; LARRY VALLIERE; GREGORY TOLLIVER; SHERMAN TOLLIVER; DWAYNE KEMP, CHRISTOPHER WONG WON, DETRON BENDROSS, BERNARD VERGIS, ASHLEY GRUNDY, and EDDIE YOUNGBLOOD, III, individually and a.k.a 2 Live Crew; TIMOTHY VINCENT YOUNG, PRISCILLA MORRIS; LUTHER JEFFERSON; LEE ESTER CRUMP; and LINDA CHRISTMAS,

Petitioners,

vs.

FRANK AINSWORTH; COPIAH COUNTY, MISSISSIPPI, SHERIFF DEPARTMENT; COPIAH COUNTY, MISSISSIPPI; HINDS COUNTY, MISSISSIPPI SHERIFF DEPARTMENT; and RANKIN COUNTY, MISSISSIPPI SHERIFF DEPARTMENT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Do citizens who are convicted of state misdemeanor violations and sentenced to pay fines only but not sentenced to any confinement whatsoever have a cause of action under § 1983 for injunctive relief and damages if they have not satisfied the favorable termination requirement of *Heck v. Humphrey*?

2. Should an injunction apply to two sheriffs who assist another sheriff in conducting illegal driver license checkpoints by sending deputies to assist in the checkpoints if the two sheriffs were unaware of the illegal programmatic purpose of the checkpoints?

LIST OF ALL PARTIES

The parties to the proceedings below were:

1. Houston Collins, Jr.; Sharlet Belton Collins; Robert Earl Collins; Velma Jean Collins; Darrell Calender; Larry Valliere; Gregory Tolliver; Sherman Tolliver; Dwayne Kemp; Christopher Wong Won; Detron Bendross; Bernard Vergis; Ashley Grundy, and Eddie Youngblood, III, individually and a.k.a 2 Live Crew; Timothy Vincent Young; Priscilla Morris; Luther Jefferson; Lee Ester Crump;[1] and Linda Christmas.

2. Frank Ainsworth; Copiah County, Mississippi Sheriff Department; Copiah County, Mississippi; Hinds County, Mississippi Sheriff Department; Rankin County, Mississippi Sheriff Department; Simpson County, Mississippi Sheriff Department; Smith County, Mississippi Sheriff Department; Jasper County, Mississippi Sheriff Department; the City of Brookhaven, Mississippi; Bruce Kirby; Chad Seals; Troy Davis; Tony Hemphill; John Goza; Harold Winters; Eddie Givens; and William Brown.

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[1] Cynthia Wilbert, the administratrix of the estate of Lee Ester Crump, was substituted as a party for Lee Ester Crump who died in 2003.

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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS BY LOWER COURTS

The United States Court of Appeals for the Fifth Circuit rendered an unpublished opinion (*per curiam*) on December 21, 2005 that is set out in full at App. 1-5. The Court of Appeals rendered an earlier opinion that is published in the official reports as *Collins v. Ainsworth*, 382 F. 3d 529 (5th Cir. 2004) and set out in full at App. 15-43. The United States District Court for the Southern District of Mississippi entered two unpublished orders denying injunctive relief to all 19 petitioners and dismissing the claims of five (5) petitioners for injunctive relief and damages. Those two unpublished opinions are set out in full at App. 8-14.

A CONCISE STATEMENT OF THE BASIS FOR JURISDICTION

This Court has jurisdiction pursuant to 28 U. S. C. §§ 1254(1) and 2101(c) to review the judgment entered by the United States Court of Appeals for the Fifth Circuit on January 17, 2006, App. 6-7, and the opinion issued on December 21, 2005, App.1-5. This case involves a conflict in decisions between the Circuit Courts of Appeals, and it involves "questions of importance which it is in the public interest to have decided by this court of last resort." *Magnum Import Co. v. Coty*, 262 U. S. 159, 163 (1923); Sup. Ct. R. 10(a) and (c) and 13(1).

THE CONSTITUTIONAL PROVISIONS AND STATUES INVOLVED

This case involves the First, Fourth, and Fourteenth Amendments to the United States Constitution, 28 U. S. C. §§ 1331, 1343, and 2254; 42 U. S. C. §§ 1983 and 1988; and Fed. R. Civ. P. 65. The pertinent text of the constitutional provisions, statutes, and rules involved are set out in the appendix at App. 44-51.

A CONCISE STATEMENT OF THE CASE

Sharlet Belton Collins and her husband, Houston Collins, Jr., "produced several concerts in Mississippi under the name S&H Productions from about 1991 to 2000." App. 17. A few of the concerts were held at Collins Field, "a multi-acre tract of land in rural Copiah County, Mississippi, owned by" Robert Collins, and his wife, Velma Collins. App. 17. "On or about May 16, 2000," Sharlet and Houston "made arrangements for the rap group 2 Live Crew" and local disc jockeys "to give a concert (the "Concert") on Sunday, June 4, 2000, at Collins Field." App. 17. The Concert venue "was to open early in the afternoon; and . . . start at 5:00 or 6:00 p.m." App. 17. Advertisements for the Concert began running on a local radio station on May 17, 2000. App. 17. Copiah County, Mississippi Sheriff, Frank Ainsworth, "stated that he had heard advertisements about the (what he classified as a "rock") Concert and was concerned that many young and old unlicensed drivers would be attending." App. 35. Ainsworth admitted that "he had received excessive noise, profanity, and trash complaints concerning a previous concert on Mother's Day" at Collins Field. App. 18, 35.

Sheriff "Ainsworth admitted that he [then] sent a warning through his deputies to" Sharlet and Houston Collins "not to hold the [2 Live Crew] Concert . . . " App. 35-36. The message delivered was that "the Concert was not going to happen. . . . " App. 18. Several days prior to the June 4, 2000 Concert, Ainsworth dispatched Copiah County Chief "Deputy William Brown and two other Copiah County deputies . . . to the Collins' home." App.17-18. The deputies told Houston that Sheriff Ainsworth "did not want the upcoming Concert to proceed." App. 17. Deputy Brown admitted "that this request was made because calls Ainsworth had received about foul language and issues related to a previous concert held on Mother's Day" at Collins Field. App. 17.

Prior to June 4, 2000, Sheriff Ainsworth decided to conduct a driver's license checkpoint near the Concert because he thought "many unlicensed drivers of all ages would be attending the 'rock' Concert." App. 18. He thought he needed additional law enforcement officers from surrounding counties to assist with conducting the checkpoint. App. 58-59. Therefore, Ainsworth and his deputies called the sheriffs of Hinds, Rankin, Simpson, Smith, and Jasper Counties along with the City of Brookhaven, Mississippi Police Department, and asked them to send deputies to assist in conducting the roadblock and checkpoint. App. 58-60. The sheriffs complied with the requests and sent deputies to assist with the checkpoint. App. 58-60. However, those sheriffs "had no knowledge of any alleged unconstitutional purpose or actions relating to the June 4 roadblock." App. 3. Sheriff Ainsworth "was the sole policymaker regarding the procedures, customs, and practices used to effectuate the checkpoint." App. 18. And, he instructed all of the deputies how to conduct the checkpoint.

App. 18. The deputies from the surrounding counties, including Hinds and Rankin, "were under the control, authority, and policy of the Copiah County Sheriff's Department, having been deputized as Copiah County deputies for the purposes of the roadblock." App. 3.

Sheriff Ainsworth had a roadblock and checkpoint "set up along Old Port Gibson ('OPG') Road leading to Collins Field" at 7:00 a.m. on June 4, 2000. App. 18. The traffic was heavy, so "another roadblock and checkpoint were set up later facing the other direction on OPG Road." App. 18. The deputies "stopped numerous vehicles at these checkpoints, including" vehicles in which all 19 petitioners were either passengers or drivers. App. 18-19. The deputies stopped vehicles where Houston Collins, Sharlet Collins, Robert Collins, Velma Collins, Darrell Calender, Larry Valliere, Gregory Tolliver, Sherman Tolliver, the members of 2 Live Crew (Dwayne Kemp, Christopher Wong Won, Detron Bendross, Bernard Vergis, Ashley Grundy, and Eddie Youngblood, III), Timothy Vincent Young, Luther Jefferson, Lee Esther Crump, Priscilla Morris,[2] and Linda Christmas were either drivers or passengers. App.18-19. The deputies "confiscated beer in plain view" and seized beer and marijuana discovered in a search of some vehicles where they were given permission to search. App. 19.

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[2] The prior opinion issued by the United States Court of Appeals for the Fifth Circuit rendered on August 20, 2004 states that Priscilla Morris was a passenger in the car driven by Luther Jefferson. App. 19. She was not. Mrs. Morris was not deposed until December 20, 2004. App. 63. This was after the case had been remanded from the Court of Appeals. She testified that she was a passenger in a vehicle with her husband and sister-in-law. Luther Jefferson testified on December 20, 2004, after remand, that he was in a vehicle alone.

The deputies arrested 70 to 80 people that day, "approximately two to three for driver's license infractions . . . but many more for the illegal possession of beer." App. 19. The arrestees included six (6) of the 19 petitioners. App. 19, 66-78. The deputies arrested Larry Valliere for a driver's license infraction, Gregory Tolliver, Sherman Tolliver, Luther Jefferson, and Priscilla Morris for possession of beer and/or marijuana, and Darrell Calender for littering. App. 66-78. Gregory Tolliver was also charged with contributing to the delinquency of a minor. App. 66-68. They "were detained overnight at the Copiah County detention center." App. 19. They were not allowed to post bail. App. 19.

Petitioners Darrell Calender, Gregory Tolliver, Sherman Tolliver, Luther Jefferson, Larry Valliere, and Priscilla Morris, were brought before two justice court judges the next morning – Monday, June 5, 2000, to make bond. App. 19, 66-78. Darrell Calender pled not guilty to littering, and the charge was passed to the file. App. 78. He was released without paying a fine or being sentenced to any confinement whatsoever. App. 78. Gregory Tolliver pled not guilty to possession of beer, possession of marijuana, and contributing to the delinquency of a minor. App. 66-68. He was convicted of possession of beer and possession of marijuana and sentenced to pay a fine only in the amount of $381.00. App. 66-78. The contributing to the delinquency of a minor charge was passed to the file. App. 68. Sherman Tolliver pled guilty to possession of beer and marijuana, and he was sentenced to pay a fine only in the amount of $371.00. App. 69-71. Priscilla Morris pled guilty to possession of beer, and she was sentenced to pay a fine only in the amount of $125.00. App. 72-73. Luther Jefferson pled guilty to possession of beer, and he was

sentenced to pay a fine only in the amount of $125.50. App. 74-75. Larry Valliere pled guilty to the charge of failing to have a driver's license, and he was sentenced to pay a fine only in the amount of $60.00. App. 76-77. Petitioner, Darrell Calender, was absolved of all crimes. App. 78. The remaining five (5) jailed petitioners were not sentenced to any confinement, probation, parole, or supervision whatsoever. App. 66-77.

The rap group 2 Live Crew, including Dwayne Kemp, Christopher Wong Won, Detron Bendross, Bernard Vergis, Ashley Grundy, and Eddie Youngblood, III, did not perform at the Concert because sheriff deputies refused to allow them to perform.[3] App. 19, 52. And, Houston and Sharlet Collins – the Concert promoters, Robert and Velma Collins – owners of Collins Field, Gregory Tolliver and Sherman Tolliver – "vendors who were going to sell food at the Concert," and Timothy Vincent Young, Priscilla Morris, Larry Valliere, Lee Ester Crump, and Linda Christmas –

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[3] The prior opinion rendered by the Fifth Circuit on August 20, 2004 states that "[t]here is evidence the cancellation [of the Concert] may have been due to the checkpoint incident upsetting [2 Live Crew], because of the roadblocks 'scaring off' concertgoers, because Sharlet Collins felt ill, or because of the weather." App. 19. That was all the evidence in the record on the reasons the Concert was cancelled when the Fifth Circuit first reviewed the case and rendered its opinion on August 20, 2004. However, the Fifth Circuit remanded the case to the District Court. After the case was remanded, the parties engaged in additional discovery. Dwayne Kemp, the manager for 2 Live Crew was deposed on March 25, 2005. App. 64-65. Mr. Kemp testified that law enforcement officers stopped 2 Live Crew from performing. App. 64-65. The officers told 2 Live Crew "ain't no show out here today. You're all not doing no show out here." App. 65.

Since this case was decided in the District Court on the respondents' summary judgment motions, the record is construed in the light most favorable to petitioners, the non-moving parties.

concertgoers, were denied the right to attend the concert because it was cancelled by the sheriff deputies. App. 19, 64-65.

On February 5, 2001, all 19 petitioners filed their "§ 1983 suit in [D]istrict [C]ourt," pursuant to 28 U. S. C. §§ 1331 & 1343 and 42 U. S. C. §§ 1983 & 1988, seeking compensatory and punitive damages, injunctive relief, and attorney fees from the respondents and the other sheriffs, a police department, and individual officers. App. 19-20, 52-53. All 19 petitioners asserted claims that the roadblocks and driver's license checkpoints had an impermissible programmatic purpose and resulted in a prior restraint on their rights to freedom of association and freedom of expression. App. 15-43. The roadblocks and checkpoints amounted to an impermissible search and seizure in violation of rights secured to them by the Fourth and Fourteenth Amendments to the United States Constitution and a prior restraint in violation of rights secured to them by the First and Fourteenth Amendments to the United States Constitution. App. 15-43. Sharlet Collins filed a declaration stating that she intended to have more concerts at Collins Field featuring the rap group 2 Live Crew, but she was afraid that if she did Sheriff Ainsworth would set up the checkpoints again as a prior restraint. App.54-56. The five (5) convicted petitioners asserted claims that they were delayed an opportunity to make bail and crammed into overcrowded and unsanitary jail conditions in violation of rights secured to them by the Fourteenth Amendment to the United States Constitution. App. 19, 28-30, 40-42. The respondents and other law enforcement officers filed summary judgment motions on grounds of qualified immunity. App. 15-43. On May 22, 2003, the District Court dismissed the sheriff departments

of Simpson, Smith, and Jasper Counties, and the City of Brookhaven, Mississippi as parties.[4] The District Court denied the remaining parties' summary judgment motions. App. 16.

Respondents, Copiah County, Mississippi Sheriff Frank Ainsworth, Copiah County, Mississippi, and the individually named deputies appealed the District Court's denial of their qualified immunity defense to the Fifth Circuit. App.16. On August 20, 2004, the Fifth Circuit rendered an opinion affirming in part and reversing in part the District Court's qualified immunity decision and remanding the case to the District Court. App. 15-43; *Collins v. Ainsworth*, supra. The Fifth Circuit dismissed all of the individually named law enforcement officers as parties except for Sheriff Frank Ainsworth. App. 15-43; *Collins v. Ainsworth*, supra, at 540-545. As to Ainsworth, the Fifth Circuit held that "discouraging the Concert from happening was an impermissible programmatic purpose, . . . [and] no sheriff could reasonably believe his actions aimed at stopping the Concert were legal and would entitle him to qualified immunity" from a Fourth Amendment claim. App.38-39; *Collins v. Ainsworth*, supra, at 544. The Fifth Circuit also held:

> By setting up these checkpoints to stop the Concert from taking place, Ainsworth abused his discretionary power to deny in advance the use of

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[4] The order dismissing these parties as defendants is an interlocutory order. A final judgment has not been entered in the case yet. Furthermore, a Rule 54(b) [Fed. R. Civ. P. 54(b)] judgment has not been entered dismissing petitioners' claims against these parties or finally dismissing the parties from the action. Therefore, these parties are parties in the lower court but not involved in the instant petition for writ of certiorari.

> Collins Filed for First Amendment-protected musical expression and association. No procedural safeguards were put in place to prevent censorship of legitimate speech and music. Therefore, we find Ainsworth's use of the driver's license checkpoints amounted to an impermissible prior restraint on the Concert.

App. 39-40; *Collins v. Ainsworth*, supra, at 545.

The Fifth Circuit remanded the case to the District Court, and the parties engaged in additional discovery. App. 43, 61-65. Then Sheriff Ainsworth and the sheriffs of Hinds and Rankin Counties filed two new summary judgment motions. Ainsworth's motion asserted all claims for money damages and injunctive relief filed by the convicted petitioners, Gregory Tolliver, Sherman Tolliver, Larry Valliere, Priscilla Morris, and Luther Jefferson, were barred by the favorable termination requirement of *Heck v. Humphrey*, 512 U. S. 477 (1994). The sheriffs of Hinds and Rankin Counties maintained that no relief, damages or injunctive, could be granted against them because their deputies were not acting under their authority but the authority of Sheriff Ainsworth. Petitioners responded to the motions and filed a motion for summary judgment on the issue of liability alone on their First and Fourth Amendments claims against the respondents. Petitioners also filed a separate motion for injunctive relief against all respondents. The District Court entered an order on March 15, 2005 granting the sheriffs of Hinds and Rankin Counties' summary judgment motion. App. 12-13. That order denied petitioners' "request for injunctive relief." App. 3. The District Court also entered an order on March 18, 2005 granting Sheriff Ainsworth's summary judgment motion denying the convicted petitioners all

requested relief, including damages and injunctive relief, based on *Heck v. Humphrey's* favorable termination requirement. App. 8-11.

Petitioners timely appealed to the Fifth Circuit pursuant to 28 U. S. C. § 1292(a)(1). App. 2-5. On December 21, 2005, the Fifth Circuit issued a *per curiam* unpublished opinion affirming the District Court. App.1-5. The Fifth Circuit held that the actions of the sheriffs of Hinds and Rankin Counties in sending deputies to assist Sheriff Ainsworth to conduct the roadblocks and driver's license checkpoints was "insufficient" for an injunction to issue against them. App. 3. The Fifth Circuit also held that *Heck v. Humphrey's* favorable termination requirement barred the convicted petitioners' claims. App. 4. The Court specifically held:

> The convicted plaintiffs contend that because they each were only fined, and not confined, as a result of their convictions, neither habeas nor any other procedural avenue is available to challenging their convictions; and consequently their situation presents an exception to the *Heck* doctrine. This contention is barred by *Randell v. Johnson*, 227 F. 3d 300, 301 (5th Cir. 2000) (rejecting the view that *Heck* should be relaxed for 'plaintiffs who have no procedural vehicle to challenge their conviction.'). Because the plaintiffs failed to raise any challenge to the convictions arising from the June 4 roadblock, the *Heck* requirement has not been satisfied and the convicted plaintiffs' § 1983 claims, including their claim for injunctive relief, cannot proceed.

App. 4.

Petitioners timely filed their petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

ARGUMENT

1. Citizens who are convicted of state misdemeanor violations and sentenced to pay fines only but not sentenced to any confinement whatsoever have a cause of action under § 1983 for injunctive relief and damages even if they have not satisfied the favorable termination requirement of *Heck v. Humphrey*.

In 1973, this Court held in *Preiser v. Rodriguez* "that habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement . . . even though such a claim may come within the literal terms of § 1983." *Heck v. Humphrey*, supra, at 481, *citing Preiser v. Rodriguez*, 411 U. S. 475, 488-490 (1973). In 1994, this Court held in *Heck v. Humphrey* "that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U. S. C. § 2254." (emphasis added). *Heck v. Humphrey*, supra, at 486-487. The Court clearly indicated that a state prisoner would have "access to a federal forum for claims of unconstitutional treatment at the hands of state officials . . . " either through the habeas statute, 28

U. S. C. § 2254, or the Civil Rights Act of 1871, 42 U. S. C. § 1983. *Heck v. Humphrey*, supra, at 480. Then, in 1998, in *Spencer v. Kemna* five Justices – four concurring and one dissenting – expressed the view that *Heck's* favorable termination requirement does not bar a § 1983 claim brought by a person who is no longer in custody when the § 1983 action is filed or where habeas relief is unavailable. *Spencer v. Kemna*, 523 U. S. 1, at 18-25 & n. 8 (1998) (Souter, J., concurring, joined by O'Connor, Ginsburg, and Breyer, JJ) ("The better view, then, is that a former prisoner, no longer 'in custody,' may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy.") (emphasis added); (Ginsburg, J., concurring) ("Individuals without recourse to the habeas statute because they are not 'in custody' (people merely fined or whose sentences have been fully served, for example) fit within § 1983's broad reach.") (emphasis added); (Stevens, J., dissenting) ("Given the Court's holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear, as Justice Souter explains, that he may bring an action under 42 U. S. C. § 1983.") (emphasis added).

In the present case, five (5) of the 19 petitioners were sentenced to pay fines only. They were not sentenced to post-conviction confinement, placed on probation, or parole. They paid their fines and were released from jail on June 5, 2000. They were not incarcerated when they filed their § 1983 action. Since they were sentenced to pay fines only and not confined at all, habeas corpus relief was not available to them. *Spring v. Caldwell*, 692 F. 2d 992 (5th Cir. 1982); *Obado v. State of New Jersey*, 328 F. 3d 716

(3rd Cir. 2003) (*per curiam*); *United States v. Bernard*, 351 F. 3d 360 (8th Cir. 2003).

The Court in *Heck v. Humphrey*, supra, and in dicta in *Spencer v. Kemna*, supra, indicated that *Heck's* favorable termination requirement does not apply if habeas relief is unavailable. This case presents the facts for the Court to decide this important question of federal law: does *Heck's* favorable termination requirement apply when habeas relief is unavailable? The Court should grant petitioners' petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit and decide this important question of federal law.

The Court, in dicta, in *Spencer* indicated that *Heck's* favorable termination requirement does not apply if the person convicted of crime is not incarcerated at the time his or her § 1983 action is filed in federal court. *Spencer v. Kemna*, supra, at 21, 25 & n. 8 (Souter, J., concurring, joined by O'Connor, Ginsburg, and Breyer, JJ), (Ginsburg, J., concurring), and (Stevens, J., dissenting). This case presents the facts for the Court to decide this important question of federal law: does *Heck's* favorable termination requirement apply when the § 1983 plaintiff is a convict of a misdemeanor who is not in custody when his or her § 1983 action is filed in federal court? The Court should grant petitioners' petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit and decide this important question of federal law.

The Circuit Courts of Appeals are split on the issue of whether or not *Heck* bar § 1983 claims for damages and injunctive relief filed by individuals convicted of crimes who do not have habeas corpus relief available to them or who are not in custody when their § 1983 actions are filed

in federal court. The First, Third, and Fifth Circuits have held that *Heck* bar such claims. *Figueroa v. Rivera*, 147 F. 3d 77, 81 n. 3 (1st Cir. 1998); *Gilles v. Davis*, 427 F. 3d 197, 209-210 (3rd Cir. 2005); *Randell v. Johnson*, 227 F. 3d 300, 301-02 (5th Cir. 2000) (*per curiam*); App. 1-5. The Second, Seventh, Eleventh, and District of Columbia Circuits have held that *Heck* does not bar such claims. *Jenkins v. Haubert*, 179 F. 3d 19 (2nd Cir. 1999); *DeWalt v. Carter*, 224 F. 3d 607, 617-18 (7th Cir. 2000); *Abusaid v. Hillsborough County Board of County Commissioners*, 405 F. 3d 1298, 1315-16, n. 9 (11th Cir. 2005); *Brown v. Plaut*, 131 F. 3d 163 (D. C. Cir. 1997). The holdings of the Second, Seventh, Eleventh, and District of Columbia Circuit Courts of Appeal are more consistent with this Court's holding in *Heck v. Humphrey* that a person convicted of a misdemeanor through unconstitutional treatment by state officials should have one of two federal avenues available to him or her for relief – either habeas corpus or § 1983. *Heck v. Humphrey*, supra, at 480. This Court should grant petitioners' petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit and resolve this conflict in the circuits.

Furthermore, since petitioners were not in custody when their § 1983 action was filed, the reasoning of the concurring and dissenting opinions in *Spencer v. Kemna*, supra, that *Heck* does not bar a § 1983 action if a plaintiff is not in custody when suit is filed should be adopted as the rule in this case.

The decisions of both the Fifth Circuit and District Court also conflict with this Court's decision in *Wilkinson v. Dotson* which held that *Heck* does not bar a § 1983 action seeking prospective injunctive relief that would not necessarily invalidate a prisoner's conviction or sentence.

Wilkinson v. Dotson, 544 U. S. 74 (2005). All 19 petitioners, including the five (5) convicted petitioners, requested prospective injunctive relief against the Copiah County, Mississippi Sheriff to stop him from using prior restraint to cancel future concerts. The requested relief would not necessarily invalidate the convictions of the five (5) convicted petitioners. Any injunction against the Copiah County Sheriff, and those in active concert with him, enjoining them from any prior restraint would not invoke *Heck*. See, *Wilkinson v. Dotson*, supra. The Court should grant petitioners' petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit because the lower courts' decisions conflict with this Court's decision in *Wilkinson v. Dotson*, supra.

Finally, the evidence used to convict petitioners Gregory Tolliver, Sherman Tolliver, Priscilla Morris, Larry Valliere, and Luther Jefferson, was discovered through deputies "plain view" or search after valid consent. App. 19. And, all of them, except for Gregory Tolliver, pled guilty. App. 66-77. The "plain view" doctrine, evidence discovered through consent searches, and guilty pleas constituted an independent source for the convictions of these five (5) petitioners. The District Court reasoned that petitioners' "crimes . . . would not have been discovered but for the check point." App. 10. The Fifth Circuit Court of Appeals affirmed. App. 1-5. That decision by the lower courts conflict with this Court's decision in *Heck* that the favorable termination requirement does not apply if there is an independent basis to sustain the conviction. *Heck v. Humphrey*, supra, at 487, n. 7. The Court should grant petitioners' petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit because the

lower courts' decisions conflict with this Court's decision in *Heck v. Humphrey*, supra, at 487, n. 7.

Therefore, the Court should grant petitioners' petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, to resolve a conflict in the circuits and settle important questions of federal law, reverse the judgment of the Fifth Circuit, and remand the case to the lower court for further proceedings in accordance with the opinion of this Court. Sup. Ct. R. 10(a) and (c).

2. An injunction should apply to two sheriffs who assist another sheriff in conducting illegal driver license checkpoints by sending deputies to assist in the checkpoints even if the two sheriffs were unaware of the illegal programmatic purpose of the checkpoints.

Petitioners seek a permanent injunction against the sheriff of Copiah County, Mississippi and all others who act in concert with him to prevent future Concerts at Collins Field from taking place. App. 1-5, 15-43, 53. The sheriffs of Hinds and Rankin Counties, at Sheriff Ainsworth's or his deputies' request, sent deputies to Copiah County to assist in the roadblocks and driver's license checkpoints. App. 58-60. Ainsworth testified that there was "no way [he] could take a handful of deputies and go out there and do anything right." App. 58-59. Ainsworth further testified that the sheriffs often send deputies to each other's counties when they need and ask for assistance. App. 60. Ainsworth had an impermissible programmatic purpose in setting up the checkpoints, App. 39-40, and he needed the assistance of deputies from the sheriff departments of neighboring counties in order to establish and

operate the checkpoints. App. 15-43, 58-60. They were set up to be a prior restraint on the scheduled concert. App. 39-40. Although the sheriffs of Hinds and Rankin Counties did not know about the impermissible programmatic purpose of the checkpoints, they knowingly sent deputies to assist. App. 3, 58-60. The Fifth Circuit held that "[t]his act alone is insufficient for the injunction sought against these defendants . . . " App. 3. This decision conflicts with a decision rendered by the United States Court of Appeals for the Eleventh Circuit in *Council for Periodical Distributors Association v. Evans*, 827 F. 2d 1483 (11th Cir. 1987). Both the Fifth Circuit and the District Court misunderstood petitioners' request for injunctive relief against the sheriffs of Hinds and Rankin Counties. Petitioners requested that a prospective injunction issue against the sheriff of Copiah County and all who act in concert with him to stop future concerts. But for the additional deputies sent by the sheriffs of the surrounding counties, the roadblock and checkpoints could not have taken place. App. 58-60. Therefore, any requested injunction should issue to them as well.

In *Council for Periodical Distributors Association v. Evans* the district attorney for Montgomery County, Alabama established a "'task force' to block the sale of allegedly obscene magazines in" the county. *Id.*, at 1485. He convinced the chief of police for the City of Montgomery to assign a police officer to the task force. *Id.*, at 1485. The district attorney called a meeting of retailers where he threatened criminal prosecution if the retailers continued selling adult magazines. *Id.*, at 1485. The police officer was present at this meeting. *Id.*, at 1485. "After a second meeting," the retailers sued the district attorney, police chief, and others for damages and injunctive relief. *Id.*, at

1485. The trial court enjoined all of the defendants and assessed attorney fees against them. *Id.*, at 1485-86. "On appeal, the City and its police chief argue[d] that they were only minor players in the prior restraint, and that they had nothing to do with the retaliatory actions." *Id.*, at 1486. The Eleventh Circuit held "without question that the district court appropriately included the City, and the police chief in its injunction." *Id.*, at 1486. The Court held, "even if they were only minor players, they were in fact players in the unconstitutional actions and were correctly enjoined from continuing those actions." *Id.*, at 1486.

In the present case, deputies from Hinds and Rankin Counties assisted in conducting the roadblocks and driver's license checkpoints that were a prior restraint. Although they were not players in planning the roadblocks and checkpoints, they were active players in enforcing the roadblock and checkpoints. But for their efforts, the prior restraint would not have happened. And, the checkpoints probably would not have occurred on that date either. "[E]ven if they were only minor players, they were in fact players in the unconstitutional actions and" an injunction should include them. *Id.*, at 1486. An injunction may issue not just against the responsible party, but also against all those who act in concert with the responsible party. *Council for Periodical Distributors Association v. Evans*, supra; Fed. R. Civ. P. 65(d). The decision of the United States Court of Appeals for the Fifth Circuit that an injunction could not issue against sheriffs who assist another sheriff in conducting illegal checkpoints by sending deputies to assist in the checkpoints conflicts with the decision of the United States Court of Appeals for the Eleventh Circuit in *Council for Periodical Distributors Association v. Evans*, supra. This case also involves an

important question of federal law – should an injunction issue against a party who participates in illegal conduct when the party is unaware that the conduct he is participating in is illegal?

Therefore, the Court should grant petitioners' petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit and resolve this conflict in the circuits and settle an important question of federal law, reverse the judgment of the Fifth Circuit, and remand the case to the lower court to proceed in accordance with the opinion of this Court. Sup. Ct. R. 10(a) and (c).

CONCLUSION

The Court should grant petitioners' petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit on the two issues presented for review in order to resolve a conflict in the circuits and settle important questions of federal law, reverse the judgment of the Fifth Circuit, and remand the case to the lower court to proceed in accordance with the opinion of this Court. Sup. Ct. R. 10(a) and (c).

Dated February 6, 2006.

Respectfully submitted,

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APPENDIX 1

IN UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-60341

HOUSTON COLLINS; SHARLET BELTON COLLINS; ROBERT EARL COLLINS; VELMA JEAN COLLINS; DARRELL CALENDER; LARRY VALLIERE; GREGORY TOLLIVER; SHERMAN TOLLIVER; DWAYNE KEMP; CHRISTOPHER WONG WON; DETRON BENDROSS; BERNARD VERGIS; ASHLEY GRUNDY; EDDIE YOUNGBLOOD, III; also known as 2 Live Crew, TIMOTHY VINCENT YOUNG; PRISCILLA MORRIS; LUTHER JEFFERSON; LEE ESTER CRUMP; LINDA CHRISTMAS,

Plaintiffs-Appellants,

versus

FRANK AINSWORTH; ET AL,

Defendants,

FRANK AINSWORTH; COPIAH COUNTY SHERIFF'S DEPARTMENT; COPIAH COUNTY, MISSISSIPPI; HINDS COUNTY SHERIFF'S DEPARTMENT; RANKIN COUNTY SHERIFF'S DEPARTMENT,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi, Jackson
USDC No. 3:01-CV-81

(Filed Dec. 21, 2005)

Before JOLLY, HIGGINBOTHAM, and SMITH, Circuit Judges.

PER CURIAM:[1]

This appeal arises from an allegedly unconstitutional roadblock that occurred on June 4, 2000 in Copiah County, Mississippi. In the present appeal the plaintiffs seek review of the denial of injunctive relief provided in separate orders granting summary judgment for two separate groups of defendants. The first, granted on March 15, 2005, dismissed all claims by all plaintiffs against the Hinds County Sheriff's Department and the Rankin County Sheriff's Department (collectively "the Hinds and Rankin County Defendants"). The second summary judgment, granted on March 18, 2005, dismissed all claims of five of the plaintiffs[2] (collectively "the convicted plaintiffs") against Frank Ainsworth and the Copiah County Sheriff's Department (collectively "the Copiah County Defendants"). We find no error in the denial of injunctive relief in either ruling and thus affirm the orders of the district court. The reasoning for each summary judgment is stated below.[3]

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[1] Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[2] Specifically the five plaintiffs were: Greg Tolliver, Sherman Tolliver, Priscilla Morris, Larry Valliere, and Luther Jefferson.

[3] We note that the parties differ on the appropriate standard of review – i.e., whether we review *de novo* since this is an appeal of a summary judgment, *see Facility Insurance Corp. v. Employers Ins. of Wausau*, 357 F.3d 508, 512 (5th Cir.2004); or for abuse of discretion since we are considering the denial of injunctive relief, *see Peaches Entertainment Corp v. Entertainment Repertoire Associates, Inc.*, 62

(Continued on following page)

I

The March 15, 2005 order granting summary judgment for the Hinds and Rankin County Defendants states clearly that it is denying the plaintiffs' request for injunctive relief. Thus there is no question as to our jurisdiction to review the plaintiffs' appeal. *See* 28 U.S.C. § 1292(a)(1) (granting appellate jurisdiction where there has been an interlocutory denial of injunctive relief).

The plaintiffs have presented no evidence that any of the Hinds and Rankin County Defendants committed any constitutional violation. In both their brief and at oral argument, plaintiffs conceded that the sheriffs of Hinds and Rankin Counties had no knowledge of any alleged unconstitutional purpose or actions relating to the June 4 roadblock. Additionally plaintiffs concede that at all times the deputies of the Hinds and Rankin County Defendants were acting under the control, authority, and policy of the Copiah County Sheriff's Department, having been deputized as Copiah County deputies for the purposes of the roadblock. Thus the only basis of plaintiffs' claim is that the sheriffs of Hinds and Rankin Counties responded to the request of the Copiah County Sheriff for assistance. This act alone is insufficient for the injunction sought against these defendants, and the denial of injunctive relief as to the Hinds and Rankin County Defendants is thus affirmed.

F.3d 690, 693 (5th Cir.1995). Under either standard the district court committed no error.

II

With respect to the March 18, 2005 order, the denial of injunctive relief was not explicit and the appellants challenge our jurisdiction. Nevertheless, we find that this order granting summary judgment in favor of the Copiah County Defendants dismissing the claims of the convicted plaintiffs denied "all relief," and thus necessarily rejected the convicted plaintiffs' claim for an injunction. As such this court has jurisdiction to consider the convicted plaintiffs' appeal of the denial of injunctive relief. *See* 28 U.S.C. § 1292(a)(1).

The district court properly rejected the convicted plaintiffs' § 1983 claims seeking injunctive relief against the Copiah County Defendants based on the doctrine of *Heck v. Humphrey,* 512 U.S. 477 (1994). The convicted plaintiffs contend that because they each were only fined, and not confined, as a result of their convictions, neither habeas nor any other procedural avenue is available for challenging their convictions; and consequently their situation presents an exception to the *Heck* doctrine. This contention is barred by *Randell v. Johnson,* 227 F.3d 300, 301 (5th Cir.2000) (rejecting the view that *Heck* should be relaxed for "plaintiffs who have no procedural vehicle to challenge their conviction."). Because the plaintiffs failed to raise any challenge to the convictions arising from the June 4 roadblock, the *Heck* requirement has not been satisfied and the convicted plaintiffs' § 1983 claims, including their claim for injunctive relief, cannot proceed. Thus the district court was not in error in dismissing the convicted plaintiffs' claim for injunctive relief.

For these reasons the district court's orders of March 15 and 18, 2005, denying injunctive relief, are

AFFIRMED.

APPENDIX 2

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 05-60341

D.C. Docket No. 3:01-CV-81

HOUSTON COLLINS; SHARLET BELTON COLLINS; ROBERT EARL COLLINS; VELMA JEAN COLLINS; DARRELL CALENDER; LARRY VALLIERE; GREGORY TOLLIVER; SHERMAN TOLLIVER; DWAYNE KEMP; CHRISTOPHER WONG WON; DETRON BENDROSS; BERNARD VERGIS; ASHLEY GRUNDY; EDDIE YOUNGBLOOD, III, also known as 2 Live Crew; TIMOTHY VINCENT YOUNG; PRISCILLA MORRIS; LUTHER JEFFERSON; LEE ESTER CRUMP; LINDA CHRISTMAS

Plaintiffs-Appellants

v.

FRANK AINSWORTH; ET AL

Defendants

FRANK AINSWORTH; COPIAH COUNTY SHERIFF'S DEPARTMENT; COPIAH COUNTY, MISSISSIPPI; HINDS COUNTY SHERIFF'S DEPARTMENT; RANKIN COUNTY SHERIFF'S DEPARTMENT;

Defendants-Appellees

Appeal from the United States District Court for the Southern District of Mississippi, Jackson

Before JOLLY, HIGGINBOTHAM, and SMITH, Circuit Judges.

JUDGMENT

(Filed Jan. 17, 2006)

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE:

A true copy
Test:
Clerk, U.S. Court of Appeals,
Fifth Circuit

By /s/ Renee McDonough
Deputy
New Orleans, Louisiana

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI JACKSON DIVISION

HOUSTON COLLINS, JR.; SHARLET BELTON COLLINS; ROBERT EARL COLLINS; VELMA JEAN COLLINS; DARRELL CALENDER; LARRY VALLIERE; GREGORY TOLLIVER; SHERMAN TOLLIVER; DWAYNE KEMP; CHRISTOPHER WONG WON; DETRON BENDROSS; BERNARD VERGIS; ASHLEY GRUNDY, and EDDIE YOUNGBLOOD, III, Individually and a.k.a. 2 Live Crew; TIMOTHY VINCENT YOUNG; PRISCILLA MORRIS; LUTHER JEFFERSON; LEE ESTER CRUMP; and LINDA CHRISTMAS

PLAINTIFFS

vs. Civil Action No. 3:01-cv-81 WS

FRANK AINSWORTH; COPIAH COUNTY, MISSISSIPPI SHERIFF DEPARTMENT; COPIAH COUNTY, MISSISSIPPI; HINDS COUNTY, MISSISSIPPI, SHERIFF DEPARTMENT; RANKIN COUNTY, MISSISSIPPI SHERIFF DEPARTMENT; SIMPSON COUNTY, MISSISSIPPI, SHERIFF DEPARTMENT; BRUCE KIRBY, CHAD SEALS, TROY DAVIS, TONY HEMPHILL, JOHN GOZA, HAROLD WINTERS, EDDIE GIVENS, WILLIAM BROWN, and JOHN DOE DEFENDANTS "A-Z"

DEFENDANTS

MEMORANDUM OPINION AND ORDER GRANTING SUMMARY JUDGMENT MOTION

Before this court is the motion for summary judgment filed by defendants Frank Ainsworth and Copiah County, Mississippi, Sheriff Department seeking summary judgment

under Rule 56(b)[1] and (c),[2] Federal Rules of Civil Procedure, against certain of the plaintiffs' claims, namely those of Greg Tolliver, Sherman Tolliver, Priscilla Morris, Larry Valliere and Luther Jefferson **[dockets # 92, 93, 94, 95, and 96]**. These plaintiffs and others have sued the various law enforcement officers and departments herein under Title 42 U.S.C. § 1983[3] for allegedly violating their constitutional rights relative to a roadblock. By the motion herein, the defendants argue that the plaintiffs named above cannot maintain this lawsuit as a matter of law. This court agrees for the reasons set out below.

Each of the above plaintiffs was convicted in criminal proceedings arising out of the driver's license check point established by Copiah County and Frank Ainsworth on

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[1] Rule 56(b) of the Federal Rules of Civil Procedure provides, in pertinent part, that "[a] party against whom a claim . . . is asserted or a declaratory judgment is sought may, at any time move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof,"

[2] Rule 56(c) of the Federal Rules of Civil Procedure provides, in pertinent part, the following:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

[3] Title 42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

June 4, 2000. None of these plaintiffs has had the convictions reversed or otherwise expunged. The defendants argue that the convictions necessarily imply that the roadblock from which these arrests stem was valid, and that any suit brought under § 1983 which would challenge or imply the validity of that conviction is barred under *Heck v. Humphries,* 512 U.S. 477, 114 S. Ct. 2364, 129 L.Ed. 2d 3 (1994).

In *Heck v. Humphries*, the Supreme Court specifically held that in order to recover on a § 1983 claim for allegedly unconstitutional harm that would render a conviction of sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed, expunged or declared invalid. When the conviction has not been overturned, the plaintiff's claim is not cognizable under § 1983. *Id.* at 487.

In this instance, these plaintiffs were convicted for charges stemming from their arrest at or near the driver's license check point. All charges stemming from the arrest were the product of the stop at the check point. Under similar circumstances, *Heck* contemplated the need to avoid competing or divergent results. The plaintiffs do not dispute that they were convicted, paid fines, and have not challenged the legitimacy of these convictions.

Opposing defendants' motion for summary judgment, plaintiffs argue that the crimes for which the plaintiffs were arrested and convicted would have been discovered on an independent basis and that such crimes were not the result of the initial stop. This court disagrees. The plaintiffs' crimes of conviction would not have been discovered but for the check point.

The Fifth Circuit consistently has held that the favorable termination requirements of *Heck* must be applied. *See Adongo v. Texas*, 2000 WL 27753 (5th Cir. 2005); *see also Queen v. Purser*, 109 Fed. Appx. 659, 2004 WL 1879999 (5th Cir. 2004); *Arnold v. Slaughter*, 2004 WL 1336636 (5th Cir. 2004); *Randell v. Johnson*, 227 F.2d 300 (5th Cir. 2000).

So, whereas the plaintiffs Sherman Tolliver, Gregory Tolliver, Larry Valliere, Priscilla Morris and Luther Johnson have each been convicted, without any reversals, their § 1983 claims necessarily implicate the validity of the underlying convictions. As such, the constitution violation claims submitted by the plaintiffs are barred in this case. Defendants' motion for summary judgment is granted.

SO ORDERED, this the 18th day of March, 2005.

s/ HENRY T. WINGATE
CHIEF UNITED STATES
DISTRICT JUDGE

Civil Action No. 3:01-cv-81 WS
Memorandum Opinion and Order
Granting Summary Judgment Motion

APPENDIX 4

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOUSTON COLLINS, JR.; ET AL — PLAINTIFFS

VS. — CIVIL ACTION NO. 3:01CV81WS

FRANK AINSWORTH; ET AL — DEFENDANTS

ORDER OF DISMISSAL WITH PREJUDICE

(Filed Mar. 15, 2005)

THIS CAUSE having come on this day for hearing on Defendants Hinds County Sheriff's Department (and Hinds County, Mississippi to the extent its interests may appear and to the extent it is properly joined herein, if any or at all) and Rankin County Sheriff's department (and Rankin County, Mississippi to the extent its interests may appear and to the extent it is properly joined herein, if any or at all), Motion to Dismiss or For Summary Judgment and the Court having considered all matters filed of record, the argument of counsel, and having duly considered the issues raised by the Defendants' Motion, the Court finds that said Motion is well taken and the same is hereby sustained.

The Court finds that the Plaintiffs did not allege and have not proved or established that any custom, policy, or practice of the Hinds County Sheriff's Department or the Rankin County Sheriff's Department resulted in any compensable injuries or harm to them or any violation of their right. Therefore, there is no basis for the imposition of liability against either the Hinds County Sheriff's Department or the Rankin County Sheriff's Department. At the conclusion of oral argument, counsel for the Plaintiffs

conceded the correctness of this point and that these Defendants could not properly be held liable for damages herein. The Court also finds that the Plaintiffs have not shown that they are likely to be damaged in the future as the result of any custom, policy, or practice of the Hinds County Sheriff's Department or the Rankin County Sheriff's Department. Given this and the absence of any constitutional violation by these Defendants, there is no basis for the issuance of an injunction against either the Hinds County Sheriff's Department or the Rankin County Sheriff's Department.

IT IS, THEREFORE, ORDERED AND ADJUDGED that this civil action and all claims asserted herein against Defendants Hinds County Sheriff's Department (and Hinds County, Mississippi to the extent its interest may appear and to the extent it is properly joined herein, if any or at all) and Rankin County Sheriff's Department (and Rankin County, Mississippi to the extent its interest may appear and to the extent it is properly joined herein, if any or at all) are hereby dismissed with prejudice, with the parties to bear their own costs.

SO ORDERED, this the 15th day of March, 2005

/s/ Henry T. Wingate
UNITED STATES
DISTRICT JUDGE

Presented by:

J. Lawson Hester (MS Bar No. 2394)
CRAIG HESTER LUKE & DODSON, P.A.
Post Office Box 12005
Jackson, Mississippi 39236-2005
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Civil No. 3:01-cv-81 WS
Order of Dismissal (as to defendant Hinds County Sheriff's Department and Rankin County Sheriff's Department)

APPENDIX 5

382 F.3d 529 (5th Cir. 2004)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-60539

HOUSTON COLLINS; SHARLET BELTON COLLINS; ROBERT EARL COLLINS; VELMA JEAN COLLINS; DARRELL CALENDER; LARRY VALLIERE; GREGORY TOLLIVER; SHERMAN TOLLIVER; DWAYNE KEMP, CHRISTOPHER WONG WON, DETRON BENDROSS, BERNARD VERGIS, ASHLEY GRUNDY, and EDDIE YOUNGBLOOD, III, Also Known As 2 Live Crew; TIMOTHY VINCENT YOUNG; PRISCILLA MORRIS; LUTHER JEFFERSON; LEE ESTER CRUMP; and LINDA CHRISTMAS,

Plaintiffs-Appellees,

versus

FRANK AINSWORTH; ET AL.,

Defendants,

FRANK AINSWORTH; BRUCE KIRBY; CHAD SEALS; TROY DAVIS; TONY HEMPHILL; JOHN GOZA; HAROLD WINTERS; EDDIE GIVENS; and WILLIAM BROWN,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Mississippi, Jackson

(Filed Aug. 20, 2004)

Before GARWOOD, WIENER, and DeMOSS, Circuit Judges.

DeMOSS, Circuit Judge:

Defendants-Appellants Frank Ainsworth, *et al.* ("Defendants"), appeal from the district court's denial of their summary judgment "motion for qualified immunity" in a 42 U.S.C. § 1983 action filed by Plaintiffs-Appellees Houston Collins, *et al.* ("Plaintiffs"), relating to roadblocks and vehicle checkpoints on the road leading to a concert planned to be held in Copiah County, Mississippi, on June 4, 2000. Defendants argue the district court erred by not granting them qualified immunity because Plaintiffs have failed to offer material facts that demonstrated clearly established constitutional violations and/or objectively unreasonable actions by Defendants.

We find that the Plaintiffs have not put forth material evidence of any constitutional violations committed by Deputies Kirby, Seals, Davis, Hemphill, Goza, Winters, Givens, and Brown. Therefore, the district court erred by not finding these deputies entitled to qualified immunity on all claims as a matter of law. We also find that Plaintiffs have not materially supported any clearly established Fourteenth Amendment violation committed by Sheriff Ainsworth as a matter of law. However, we find that, taking Plaintiffs' facts regarding Sheriff Ainsworth's conduct as true, his actions in connection with the checkpoints were objectively unreasonable in light of clearly established Fourth Amendment law, as to all Plaintiffs, and First Amendment law, as to most Plaintiffs. Therefore, we REVERSE the district court's denial of qualified immunity as to all deputy Defendants on all issues and as to Sheriff Ainsworth on the Fourteenth Amendment issue; we AFFIRM the court's denial of qualified immunity as to

Sheriff Ainsworth on the Fourth Amendment issue; we AFFIRM in part and REVERSE in part the court's denial of qualified immunity as to Sheriff Ainsworth on the First Amendment issue; and we REMAND for proceedings consistent with this opinion.

BACKGROUND

Plaintiffs Sharlet Belton Collins and Houston Collins (together, the "Collins") produced several concerts in Mississippi under the name S&H Productions from about 1991 to 2000. Some of these concerts were staged at Collins Field, a multi-acre tract of land in rural Copiah County, Mississippi, owned by Plaintiffs Robert Earl Collins and Velma Jean Collins. On or about May 16, 2000, the Collins made arrangements for the rap group 2 Live Crew to give a concert (the "Concert") on Sunday, June 4, 2000, at Collins Field. Collins Field was to open early in the afternoon; and the Concert, which included opening disc jockey acts, was to start at 5:00 or 6:00 p.m. Starting on May 17, 2000, a local radio station began airing ads for the Concert.

Early during the week prior to June 4, 2000, Copiah County Deputy William Brown and two other Copiah County deputies not named as defendants, Andre Davis and Fred Boyd according to Brown, went to the Collins' home. They informed Houston that the sheriff of Copiah County, Frank Ainsworth, did not want the upcoming Concert to proceed. Brown stated that this request was made because of calls Ainsworth had received about foul language and issues related to a previous concert held on Mother's Day. The Collins stated the request was really solicitation for a bribe and retaliation for supporting

Ainsworth's political opponent. Ainsworth admitted in a television interview that deputies from his office had warned Houston not to have the Concert. Both Sharlet and Houston Collins stated the message that the Concert was not going to happen was sent by Ainsworth.

Prior to June 4, 2000, Ainsworth had the county attorney contact the state attorney general's office to obtain an opinion concerning the legality of a driver's license checkpoint. Ainsworth claimed that he was concerned that many unlicensed drivers of all ages would be attending the "rock" Concert, which he had heard advertised. He also stated he had received excessive noise, profanity, and trash complaints concerning a previous concert on Mother's Day. Ainsworth stated that no checkpoints had ever been held in connection with county-staged rodeos because he did not think unlicensed drivers would attend rodeo events. He also claimed that he instructed the deputies who would conduct the checks to be courteous and treat people fairly, and to stop each car approaching the checkpoints, regardless if they planned to attend the Concert. Deputies were instructed to make arrests for any criminal violations found in connection with the checkpoints. Ainsworth stated he was the sole policymaker regarding the procedures, customs, and practices used to effectuate the checkpoints.

On June 4, 2000, at about 7:00 a.m., a roadblock and vehicle checkpoint had been set up along Old Port Gibson ("OPG") Road leading to Collins Field. There was heavy traffic, and another roadblock and checkpoint were set up later facing the other direction on OPG Road. During the course of the day on June 4, 2000, deputies from Copiah County's Sheriff's Office stopped numerous vehicles at these checkpoints, including those driven by certain

Plaintiffs: Houston Collins, Sharlet Collins, Robert Collins, Velma Collins, Darrell Calender, Larry Valliere, Gregory Tolliver, Sherman Tolliver, the members of 2 Live Crew, Timothy Vincent Young, Luther Jefferson, and Lee Esther Crump. Plaintiff Linda Christmas was a passenger in Crump's vehicle that was stopped; Plaintiff Priscilla Morris was a passenger in Jefferson's vehicle that was stopped. Deputies confiscated beer in plain view. Deputies also asked permission to search some of the vehicles; some searches yielded beer and/or marijuana.

Deputies arrested approximately 70 to 80 people, approximately two to three for driver's license infractions, including Larry Valliere, but many more for the illegal possession of beer. These arrestees, including Darrell Calender, Larry Valliere, Gregory Tolliver, Sherman Tolliver, Luther Jefferson, and Priscilla Morris, were detained overnight at the Copiah County detention center. Ainsworth had instructed that no one could be released until the morning – Monday, June 5, 2000. There is evidence that thunderstorms set in that night and two judges were brought in the next morning for Plaintiffs to make bond. The large number of detainees exceeded the jail's capacity, which was approximately 50 people.

The rap group 2 Live Crew did not perform at the Concert. There is evidence the cancellation may have been due to the checkpoint incident upsetting them, because of the roadblocks "scaring off" concertgoers, because Sharlet Collins felt ill, or because of the weather. It appears some of the opening deejay acts did perform at the Concert, starting around 1:00 or 2:00 p.m.

Plaintiffs, who are African-American, filed this § 1983 suit in district court on February 5, 2001. Plaintiffs included

the Concert promoters, Houston and Sharlet Collins; the owners of Collins Field, Robert and Velma Collins; the members and managers of 2 Live Crew, Dwayne Kemp, Christopher Wong Won, Detron Bendross, Bernard Vergis, Ashley Grundy, and Eddie Youngblood, III; vendors who were going to sell food at the Concert, Gregory Tolliver and Sherman Tolliver; and certain would-be concertgoers, all other Plaintiffs. Defendants included Copiah County Sheriff Ainsworth, and Copiah County Deputies Brown, Kirby, Seals (whose actual last name is Sills[1]), Davis, Hemphill, Goza, Winters, and Givens, who were all sued in their individual and official capacities. Plaintiffs made various allegations about how Defendants' actions at the roadblock and associated checkpoint stops violated their Fourth and First Amendment rights. Those Plaintiffs who were arrested at the checkpoints and taken to jail alleged that their Fourteenth Amendment due process rights were violated because they were not permitted to make bail within 24 hours of being arrested and were detained in an overcrowded jail.

Defendants filed a motion seeking qualified immunity, arguing that Plaintiffs had not shown that Defendants had taken any specific actions that violated Plaintiffs' constitutional rights. Plaintiffs did not specifically respond to this motion, other than submitting a jail log that showed certain Plaintiffs had been arrested the day of the concert and the Minutes of a 1966 meeting of the Copiah County Board of Supervisors recording the Board's decision to permit the sale and possession of "alcoholic liquors"

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[1] We refer to Deputy Sills throughout as Seals, as indicated in the cause's caption.

in Copiah County.[2] Plaintiffs then filed a cross-motion for summary judgment, including depositions from Ainsworth, Brown, Givens, Seals, Davis, Sharlet Collins, and Houston Collins. Plaintiffs then supplemented with a news report videotape exhibit and answers to interrogatories. Defendants filed a reply that to the extent Plaintiffs' filing could be a response to Defendants' motion for qualified immunity, Plaintiffs had not shown Defendants were not entitled to qualified immunity because Plaintiffs had offered no evidence of the violation of any constitutional rights. Without any analysis, the district court denied qualified immunity to all Defendants. In that order, the district court also denied Plaintiffs' cross-motion for summary judgment. Defendants timely filed the instant interlocutory appeal to challenge the district court's denial of qualified immunity.

DISCUSSION

Jurisdiction over and standard of review of summary judgment motions predicated on qualified immunity.

First, this Court must decide whether Defendants' motion for qualified immunity should be considered a motion to dismiss under Federal Rule of Civil Procedure

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[2] Under Mississippi law, counties can elect whether to allow the legal possession of alcoholic beverages, or light wine and beer. *See* Miss. Code Ann. §§ 67-1-1 *et seq.*, 67-3-1 *et seq.* (2003); ***Dantzler v. State***, 542 So. 2d 906, 909 (Miss. 1989). In Copiah County, possession of beer is a chargeable offense, ***Mayo v. State***, 843 So. 2d 739, 740 (Miss. Ct. App. 2003), even though possession of hard liquor appears to be permitted. Thus, the "alcoholic liquors" referenced in the Copiah County Board's minutes appear to refer to alcoholic beverages as opposed to light wine and beer.

12(b)(6) or a motion for summary judgment under Federal Rule of Civil Procedure 56. The district court was presented with documentary evidence relevant to the qualified immunity issue. Although the court did not state it was relying on these documents in making its decision, it did reject Plaintiffs' cross-motion for summary judgment based on its finding that there were genuine issues of material fact precluding summary judgment. Plaintiffs had filed their documentary evidence in support of this motion, which must have been reviewed by the district court. Therefore, the denied motion for qualified immunity is treated as a denial of a motion for summary judgment. *See* ***Fernandez-Montes v. Allied Pilots Ass'n***, 987 F.2d 278, 283 n.7 (5th Cir. 1993) (noting that when matters outside the pleadings are considered, a motion to dismiss should be construed as a motion for summary judgment).

This Court has interlocutory jurisdiction to determine the legal question of whether Plaintiffs' summary judgment facts state a § 1983 claim under clearly established law. *See* ***Nerren v. Livingston Police Dep't***, 86 F.3d 469, 472 (5th Cir. 1996); *see also* ***Mitchell v. Forsyth***, 472 U.S. 511, 530 (1985) ("[A] district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment."). When a district court denies an official's motion for summary judgment based on qualified immunity, the court is considered to have made two distinct determinations, even if only implicitly. ***Kinney v. Weaver***, 367 F.3d 337, 346 (5th Cir. 2004) (en banc). "First, the district court decides that a certain course of conduct would, as a matter of law, be objectively unreasonable in light of clearly established law." ***Id.*** "Second, the court

decides that a genuine issue of fact exists regarding whether the defendant(s) did, in fact, engage in such conduct." ***Id.*** On interlocutory appeal, we do not have jurisdiction to challenge the district court's assessments regarding the sufficiency of the evidence; instead we review "the purely legal question whether a given course of conduct would be objectively unreasonable in light of clearly established law." ***Id.*** at 347. Therefore:

> [W]e have jurisdiction only to decide whether the district court erred in concluding as a matter of law that officials are not entitled to qualified immunity on a given set of facts. As one of our cases succinctly puts it, "we can review the *materiality* of any factual disputes, but not their *genuineness.*"

Id. (quoting ***Wagner v. Bay City***, 227 F.3d 316, 320 (5th Cir. 2000)).

Unlike in appeals of most summary judgment rulings where we would employ *de novo* review, applying the same Rule 56 standard used by the district court, in the context of a denial of qualified immunity we "consider [] only whether the district court erred in assessing the legal significance of the conduct that the district court deemed sufficiently supported for purposes of summary judgment." ***Kinney***, 367 F.3d at 348. Any factual disputes that exist in a qualified immunity appeal are resolved in favor of Plaintiffs' version of the facts. ***Id.***; ***Wagner***, 227 F.3d at 320 ("Even where, as here, the district court has determined that there are genuine disputes raised by the evidence, we assume plaintiff's version of the facts is true. . . . "). Where, as here, the district court failed to set forth the specific factual disputes that precluded granting summary judgment based on qualified immunity, we

"review the record in order 'to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed.'" ***Kinney***, 367 F.3d at 348 (quoting ***Johnson v. Jones***, 515 U.S. 304, 319 (1995)).

This Court conducts a bifurcated analysis to assess the defense of qualified immunity. ***Bazan ex rel. Bazan v. Hidalgo County***, 246 F.3d 481, 490 (5th Cir. 2001). First, Plaintiffs must allege that Defendants violated their clearly established constitutional rights. ***Id.*** Constitutional law can be clearly established "despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." ***Hope v. Pelzer***, 536 U.S. 730, 740 (2002) (internal quotations omitted). Second, if Plaintiffs have alleged such a violation, this Court must consider whether Defendants' actions were objectively reasonable under the circumstances. ***Bazan***, 246 F.3d at 490; *see also* ***Harlow v. Fitzgerald***, 457 U.S. 800, 819 (1982). That is, this Court must decide whether reasonably competent officers would have known that their actions violated law which was clearly established at the time of the disputed action. ***Bazan***, 246 F.3d at 490. "[L]aw enforcement officers who reasonably but mistakenly commit a constitutional violation are entitled to immunity." ***Id.*** at 488 (internal quotations and citation omitted).

Clearly established Fourth Amendment law.

The first claim Plaintiffs make is a Fourth Amendment claim, that the roadblock and driver's license checkpoints amounted to an impermissible search and seizure. The Supreme Court has held:

> [E]xcept in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.

Delaware v. Prouse, 440 U.S. 648, 663 (1979). ***Prouse*** invalidated a discretionary, suspicionless stop for a spot check of a single motorist's license and registration; however, the Court indicated that "[q]uestioning of all oncoming traffic at roadblock-type stops" to verify driver's licenses and registrations would be a lawful means of furthering the vital interest in highway safety. ***Id.***; *see also* ***City of Indianapolis v. Edmond***, 531 U.S. 32, 39 (2000) (noting same).[3]

The Supreme Court in ***Brown v. Texas***, 443 U.S. 47 (1979), further articulated the balancing test used to determine the reasonableness of a seizure in the context of a suspicionless stop of a man who was walking in an alley: "Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizures, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." ***Id.*** at 50-51. There, the Court, citing ***Prouse***, invalidated a Texas statute making it a crime to refuse to identify oneself to a peace

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[3] To that end, in Mississippi roadblocks where all incoming traffic is stopped for a driver's license check have been found permissible under the Fourth Amendment. ***Miller v. State***, 373 So. 2d 1004, 1005 (Miss. 1979).

officer because "[i]n the absence of any basis for suspecting . . . misconduct, the balance between the public interest [in crime prevention] and appellant's right to personal security and privacy tilts in favor of freedom from police interference." ***Brown***, 443 U.S. at 51-53.

This type of balancing test has also been repeatedly utilized in the context of suspicionless vehicle checkpoint stops. Though decided before ***Prouse*** and ***Brown***, the Supreme Court in ***United States v. Martinez-Fuerte***, 428 U.S. 543, 555, 566-67 (1976), balanced the public interest in intercepting illegal aliens against individual plaintiffs' Fourth Amendment privacy interests to explicitly permit brief, suspicionless seizures at fixed Border Patrol checkpoints to inquire about citizenship. Citing ***Martinez-Fuerte*** and the test outlined in ***Brown***, the Court has also allowed sobriety checkpoints aimed at removing drunk drivers from the road, finding the balance to weigh in favor of the public interest in preventing drunk driving. ***Michigan Dep't of State Police v. Sitz***, 496 U.S. 444, 450, 455 (1990). In the most recent checkpoint case, ***Edmond***, the Court found a checkpoint program primarily designed to interdict illegal narcotics to contravene the Fourth Amendment because unlike the permissible, tailored public concerns of policing the border in ***Martinez-Fuerte*** or ensuring road safety in ***Sitz***, the drug checkpoints served the impermissible programmatic purpose of detecting evidence of ordinary criminal wrongdoing. 531 U.S. at 41-42, 48. ***Edmond*** reemphasized that "our cases dealing with intrusions that occur pursuant to a general scheme absent individualized suspicion have often required an inquiry into purpose at the programmatic level." ***Id.*** at 46. ***Edmond*** also reemphasized that this inquiry requires examination of available evidence to

determine the programmatic purpose of the checkpoint. ***Id.***

It is therefore clearly established that this Court is to examine the available evidence to determine the programmatic purpose of the checkpoint implicating the Fourth Amendment. Then we subject such checkpoint to a balancing test to determine whether it is constitutionally permissible – weighing the public interest, if any, advanced by the checkpoint against individual Plaintiffs' protected privacy and liberty interests.

Clearly established First Amendment law.

The second claim Plaintiffs make is a First Amendment prior restraint claim. Live musical entertainment such as the Concert is unquestionably speech and expression subject to the guarantees of the First Amendment. *See* ***Ward v. Rock Against Racism***, 491 U.S. 781, 790 (1989); ***McClure v. Ashcroft***, 335 F.3d 404, 409 (5th Cir. 2003) (citing ***Schad v. Borough of Mount Ephraim***, 452 U.S. 61, 65 (1981)); *see also* ***Southeastern Promotions, Ltd. v. City of West Palm Beach***, 457 F.2d 1016, 1020 (5th Cir. 1972) (noting that presenting the musical "Hair" at a municipal auditorium is constitutionally protected). Implicit in the right to engage in First Amendment-protected activities is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." ***Roberts v. United States Jaycees***, 468 U.S. 609, 622 (1984). When public officials are given the power to deny use of a forum in advance of actual expression or association, the danger of prior restraints exists. ***Southeastern Promotions, Ltd. v. Conrad***, 420 U.S. 546, 553 (1975).

Although prior restraints are not unconstitutional *per se*, any system of prior restraint is weighted with a strong presumption of constitutional infirmity. ***FW/PBS, Inc. v. City of Dallas***, 493 U.S. 215, 225 (1990); ***Bantam Books, Inc. v. Sullivan***, 372 U.S. 58, 70 (1963). The Supreme Court has explained:

> The presumption against prior restraints is heavier – and the degree of protection broader – than that against limits on [obscene] expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.

Conrad, 420 U.S. at 558-59. "[A] system of prior restraint avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." ***Id.*** at 559 (citation and internal quotation marks omitted) (describing prompt judicial review). It is thus clearly established that if public officials abuse their discretionary power to deny in advance use of a forum for First Amendment-protected expression without enacting proper safeguards, this constitutes an impermissible prior restraint.

Clearly established Fourteenth Amendment law.

Finally, Plaintiffs who were arrested as a result of the checkpoints and detained at Copiah County jail make a

due process claim related to the imposed delay in their making bail and their confinement in cramped conditions. Under Mississippi law, arrested persons must be permitted to make bail or bond within 48 hours of arrest. ***Quinn v. Estate of Jones***, 818 So. 2d 1148, 1152 (Miss. 2002) (citing Uniform Circuit and County Court Rule 6.03: "[E]very person in custody shall be taken, without unnecessary delay and within 48 hours of arrest, before a judicial officer or other person authorized by statute for an initial appearance."); *see also* ***Evans v. State***, 725 So. 2d 613, 643 n.2 (Miss. 1997) (citing same).

Overcrowding of persons in custody is not *per se* unconstitutional. *See* ***Rhodes v. Chapman***, 452 U.S. 337, 347-50 (1981). However, the Fourteenth Amendment prohibits the "imposition of conditions of confinement on pretrial detainees that constitute 'punishment.'" ***Hamilton v. Lyons***, 74 F.3d 99, 103 (5th Cir. 1996) (citing ***Bell v. Wolfish***, 441 U.S. 520, 535 (1979)). In ***Hamilton***, where a detainee alleged he was denied visitation, telephone access, recreation, mail, legal materials, sheets, and showers for a three-day period, this Court found such treatment did not amount to punishment to give rise to a constitutional claim. 74 F.3d at 106 (citing ***Bell*** for proposition that the Constitution is not concerned with a "*de minimis* level of imposition" on pretrial detainees). This Court applies the ***Bell*** test to assess pretrial detainee due process claims:

> [I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." [Footnote omitted.] Conversely, if a restriction or condition is not reasonably related to a legitimate goal – if it

> is arbitrary or purposeless – a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.

441 U.S. at 539. "[T]his test is deferential to jail rulemaking; it is in essence a rational basis test of the validity of jail rules." ***Hare v. City of Corinth, Miss.***, 74 F.3d 633, 646 (5th Cir. 1996) (describing ***Bell*** test). Thus, it is clearly established that pretrial detainees' due process rights are violated when they are subjected to conditions of confinement that constitute punishment which are not reasonably related to a legitimate governmental objective.

Whether individual Defendants Kirby, Hemphill, Goza, Winters, Seals, and Givens are entitled to qualified immunity.

Based on the summary judgment record evidence, Plaintiffs have not shown that Deputies Hemphill, Goza, Winters, Seals, and Givens had any particular material interaction whatsoever with any particular Plaintiff.

Deputy Seals stated he was informed the purpose of the checkpoint was to check the driver's license of each person who came through a checkpoint, no matter his destination; Seals checked fewer than 100 licenses and aided in only one arrest of an older Caucasian man for possession of beer.

Deputy Givens stated the Copiah County Sheriff's Department followed state policy for conducting driver's license checkpoints. According to this policy, as outlined in an opinion from the state attorney general, deputies could not randomly stop cars but had to follow a uniform pattern. Here, all vehicles were to be stopped regardless of

their destination. Givens stated he was present at the checkpoint in a supervisory capacity. He checked a few driver's licenses but did not arrest anyone.

None of the other deputies' deposition testimony indicates any particular interaction by these deputy Defendants with any particular Plaintiff.

Sharlet Collins stated that she was aware Plaintiff Priscilla Morris had been arrested in connection with the roadblock but could not say by which officer. Sharlet stated Plaintiff Eddie Youngblood, III had been "harassed" at the checkpoint but could not say by which officers. Sharlet stated she was not arrested but was asked for identification each time she passed through the roadblock; unnamed officers asked to search her trunk once, but she could not remember if they did.

Houston Collins stated that officers asked for his driver's license several times that he passed through the roadblock, and also asked him if he had anything illegal in his car and if they could search it, but he could not remember any officers' names. At one point, unknown officers searched his trailer. Houston was not arrested and said he had not heard of or spoken with many of the deputy Defendants. He stated that the officers made comments regarding the checkpoints being "the sheriff's doing" and that the officers did not know why they were there. Houston also stated in the videotape that deputies conducting the checkpoints stopped every car.

There is no evidence put forth by Plaintiffs as to any of these deputy Defendants having, using, or abusing their public official discretion to deny use of a forum for First Amendment-protected expression as a prior restraint, nor to any specific mistreatment by these deputy Defendants

regarding Plaintiffs' ability to make bond or crowded jail conditions.

Thus, the evidence does not show that the specific actions of these deputy Defendants violated any clearly established constitutional rights of Plaintiffs. Taking Plaintiffs' evidence as true, because Deputies Kirby, Hemphill, Goza, Winters, Seals, and Givens did not take any particular actions with regard to particular Plaintiffs, the district court erred in assessing the legal significance of the conduct that the court deemed sufficiently supported for purposes of denying summary judgment based on qualified immunity. Therefore, these Defendants are entitled to qualified immunity as a matter of law on all claims.

Whether individual Defendants Davis and Brown are entitled to qualified immunity.

Based on the summary judgment record evidence, Plaintiffs have not shown that Deputies Davis and Brown had any material interaction with any Plaintiff that amounted to the allegation of any constitutional violation.

Deputy Davis stated that the morning of the checkpoint, deputies were informed that the purpose of the checkpoint was to check driver's licenses, and not to ask additional questions of drivers who had valid licenses. Davis said he checked hundreds of licenses and made inquiries of those drivers who had beer in plain view. Davis did not search any trunks and did not hear of other officers requesting to do so, although he did unsuccessfully request to search one vehicle whose occupants were smoking marijuana. Davis arrested about 50 people that day, and the total number of arrestees was between 70 and

100. Davis stated these people could not make bond till the next morning but did not know whether this was pursuant to Sheriff Ainsworth's orders. Davis did not know how many people were already being held at the jail when the checkpoint arrestees were brought in. Davis arrested Plaintiff Sherman Tolliver, who was charged with possession of beer and marijuana, and with contributing to the delinquency of a child who was a passenger in Tolliver's car. Davis also arrested Plaintiff Gregory Tolliver for possession of beer but did not recall whether he was in the same car as Sherman.

Deputy Brown stated that he remembered going to the Collins' home prior to June 4, 2000. Sheriff Ainsworth had asked Brown to speak with the Collins and request they not have the Concert due to complaints from the prior concert. Brown stated Ainsworth did not tell him why the checkpoint was being set up but did instruct deputies to be courteous and treat people fairly. Brown stated he only stopped one Caucasian man, confiscated his beer, and arrested him.

Both the Collins recounted the visit to their home by Brown and two other officers. Sharlet indicated the message that the planned Concert "ain't going to happen" came from Ainsworth. Houston stated that Brown said he did not know why Ainsworth did not want the Concert to occur. Houston stated that an officer Bauer or Boyer told him that Ainsworth would not let the Concert occur because Houston had not agreed to share any Concert proceeds with Ainsworth. Houston stated the three deputies who came to their house said they were "just delivering a message." Sharlet also stated that at some point on June 4 Brown asked her to leave the checkpoint area,

which may or may not have been while she was videotaping and/or photographing the scene.

There is no evidence put forth by Plaintiffs as to either Davis or Brown having, using, or abusing their public official discretion to deny use of a forum for First Amendment-protected expression as a prior restraint, nor to any specific mistreatment by these deputy Defendants regarding Plaintiffs' ability to make bond or crowded jail conditions.

Thus, the evidence does not show that the actions of these deputy Defendants amounted to a violation of any clearly established constitutional rights of Plaintiffs. Plaintiffs put forth no evidence that Davis's particular arrests of Sherman and Gregory Tolliver were unlawful or carried out in any violative way; also, Davis was unaware that the checkpoint might have had any purpose other than to check driver's licenses. Plaintiffs put forth no evidence that Brown stopped any of them at the checkpoints. While Brown delivered a message from Ainsworth to the Collins that Ainsworth did not want the Concert to take place, and directed Sharlet to leave the checkpoint area, such actions by themselves did not violate Plaintiffs' constitutional rights. Taking Plaintiffs' evidence as true, because Deputies Davis and Brown took only limited actions with regard to Plaintiffs – no action that amounted to any violation of Plaintiffs' constitutional rights – the district court erred in assessing the legal significance of the conduct that the court deemed sufficiently supported for purposes of denying summary judgment based on qualified immunity. Therefore, these Defendants are entitled to qualified immunity as a matter of law.

Whether individual Defendant Ainsworth is entitled to qualified immunity.

Based on the summary judgment record evidence, Plaintiffs have shown that Sheriff Ainsworth had material interactions relating to the checkpoints which amounted to the allegation of a Fourth Amendment violation, as to all Plaintiffs, and a First Amendment violation, as to most Plaintiffs, but not a Fourteenth Amendment violation.

Sheriff Ainsworth stated that he had heard advertisements about the (what he classified as a "rock") Concert and was concerned that many young and old unlicensed drivers would be attending. Ainsworth said he based this concern on "[j]ust prior experience and being a sheriff." Ainsworth had the county attorney contact the state attorney general's office to obtain an opinion regarding the legality of a driver's license checkpoint. Ainsworth stated he instructed the deputies conducting the checkpoints to be courteous, and to stop each car that approached a checkpoint on OPG Road. There were two checkpoints due to the high volume of cars traveling toward Collins Field. Checkpoints had previously been set up on OPG Road, but they had never been set up for rodeos; Ainsworth also stated he had never worked a rock concert as a sheriff before. Ainsworth stated the first people stopped were Caucasian; and about 70 to 80 people were arrested at the checkpoints, taken to the jail, and held until the next morning. Ainsworth had instructed officers that the arrestees were not to be released until the next day. Ainsworth stated that his Sheriff's Office had received complaints about a previous Collins Field concert involving profanity, noise, and trash dumping. Ainsworth admitted that he had sent a warning through his deputies

to the Collins not to hold the Concert; deposition testimony from Brown and the Collins confirms this.

Sharlet Collins stated the message that they received from Brown about canceling the Concert came from Ainsworth, and the roadblock was retaliation for the Collins' supporting Ainsworth's opponent in the previous election. Ainsworth stated he did not know who the Collins had supported. Houston Collins also stated the message was sent by Ainsworth and that Ainsworth did not want the Concert to take place unless Ainsworth received some payback of the proceeds.

Both checkpoints were located on OPG Road. Deposition testimony indicates the location of the checkpoints to be at opposite sides just outside the entrance gates of Collins Field and the Concert.

Fourth Amendment violation.

Plaintiffs argue one actual programmatic purpose of the checkpoints was to detect evidence of ordinary criminal wrongdoing, which as the Supreme Court stated in ***Brown***, 443 U.S. at 51-53, and confirmed in ***Edmond***, 531 U.S. at 41-42, 48, is an impermissible purpose in suspicionless stops. The summary judgment record evidence does not show this to be an actual purpose pursued by Defendants. The deputies' testimony shows the purpose declared by Ainsworth to be checking for unlicensed drivers. The only evidence as to confiscation of beer and/or marijuana demonstrates that deputies were told to take, and did take, such items only when discovered in plain sight or when a search was consented to. Thus, the purpose of ordinary crime prevention or detection is not materially supported by the evidence.

Plaintiffs also put forth the argument, which is amply supported by the record, that another programmatic purpose of the checkpoint was to stop the Concert from occurring, and that Ainsworth unconstitutionally enforced driver's license checkpoint law to accomplish this goal. Ainsworth maintains he is entitled to qualified immunity because the checkpoints were constitutionally proper. The checkpoints were a legitimate exercise of the government's power to regulate drivers for safety reasons. Ainsworth also points to the fact that he sought and relied on an opinion regarding the legality of driver's license checkpoints from the attorney general's office.

However, taking Plaintiffs' summary judgment evidence as true, the record indicates that Sheriff Ainsworth was pursuing the programmatic purpose of discouraging the Concert from taking place when he set up and conducted the checkpoints on OPG Road leading to Collins Field. Though Ainsworth claims the checkpoints were set up to advance general highway safety, and the checkpoints may have been facially valid pursuant to Mississippi law and under ***Prouse***, 440 U.S. at 663, as reindicated in ***Edmond***, 531 U.S. at 39, Plaintiffs have put forth material evidence that shows another programmatic purpose which was advanced by Sheriff Ainsworth. Whether it be because Ainsworth did not want to receive complaints about another concert, the Collins had not supported him in the prior election, or Ainsworth wanted to elicit a bribe, discouraging the Concert from happening was an impermissible programmatic purpose.

It is clear that the checkpoints at issue were seizures implicating the Fourth Amendment. ***Sitz***, 496 U.S. at 450; *see also* ***Martinez-Fuerte***, 428 U.S. at 556 ("It is agreed that checkpoint stops are 'seizures' within the meaning of

the Fourth Amendment."). Under the ***Brown*** balancing test we consider the reasonableness of those seizures. ***Sitz***, 496 U.S. at 450. Although there is no evidence disputing that promoting highway safety is a legitimate public concern, Plaintiffs have advanced evidence that the actual primary purpose of the stops was the impermissible nonpublic concern of suppressing the Concert. It is true that the evidence shows a few unlicensed drivers were removed from the highway after being stopped at the checkpoints. *See, e.g.*, ***id.*** at 454-55 (finding the removal of two drunk drivers from 126 persons stopped at a sobriety checkpoint to be enough to effectively advance the public interest). However, it is also true that the headline act 2 Live Crew did not perform at the Concert. Thus, the checkpoints were also effective at advancing their impermissible programmatic purpose. Though the intrusion on most individuals stopped at the checkpoints appears to have been brief and not severe, *see* ***id.*** at 452-53, in light of the improper programmatic goal and effect of stopping the Concert, we find the ***Brown*** balancing test weighs in favor of the unreasonableness of the checkpoints.

Plaintiffs have thus clearly alleged that Ainsworth's conduct in connection with the checkpoints constituted a violation of their Fourth Amendment rights. Moreover, an objectively reasonable officer would or should have known that discouraging a First Amendment-protected musical performance – *see, e.g.*, ***Ward***, 491 U.S. at 790; ***Schad***, 452 U.S. at 65 – would not constitute a legitimate public interest such that the ***Brown*** balancing test used to determine the constitutionality of suspicionless checkpoint stops would weigh in favor of Plaintiffs' personal Fourth Amendment interests under clearly established law. We find that, under these circumstances, no sheriff could

reasonably believe his actions aimed at stopping the Concert were legal and would entitle him to qualified immunity. Therefore, the district court was correct in its assessment of the legal significance of Ainsworth's conduct that the court deemed sufficiently supported the denial of summary judgment based on qualified immunity on the Fourth Amendment claim.

First Amendment prior restraint violation.

Plaintiffs argue that Ainsworth's warning that the concert was not going to occur, coupled with the setup of the checkpoints themselves, amounted to a prior restraint on the Concert and thus infringed their rights of free expression and association. Ainsworth responds that the checkpoints were entirely legitimate and did not constitute a prior restraint.

For essentially the same reasons we find no error in the district court's denial of qualified immunity against Ainsworth on the Fourth Amendment issue, this Court agrees with Plaintiffs. Plaintiffs presented evidence that after failing to dissuade the Concert sponsors from proceeding with their plans for the 2 Live Crew event, Ainsworth chose to erect an indirect (but fully effective) bar in the guise of a facially valid pair of driver's license checkpoints on either side of OPG Road, flanking the only entrance to Collins Field. By setting up these checkpoints to stop the Concert from taking place, Ainsworth abused his discretionary power to deny in advance the use of Collins Field for First Amendment-protected musical expression and association. No procedural safeguards were put in place to prevent censorship of legitimate speech and music. Therefore, we find Ainsworth's use of the driver's

license checkpoints amounted to an impermissible prior restraint on the Concert.

Most Plaintiffs thus have clearly alleged a constitutional violation by Ainsworth. As to most Plaintiffs, we find under these circumstances that no sheriff could reasonably believe his actions aimed at stopping the Concert were legal and would entitle him to qualified immunity. Therefore, the district court was correct in its assessment of the legal significance of Ainsworth's conduct that the court deemed sufficiently supported the denial of summary judgment on the First Amendment claim as to most Plaintiffs.

However, we find no evidence in the summary judgment record indicating that Plaintiffs Darrell Calender, Priscilla Morris, and Luther Jefferson had any intentions to attend the Concert. Thus, these Plaintiffs have not clearly alleged a First Amendment violation. Sheriff Ainsworth is entitled to qualified immunity on the First Amendment issue as to these Plaintiffs.

Fourteenth Amendment violations.

Finally, Plaintiffs who were arrested and held at Copiah County's detention center argue that they were denied their right to make bail within 24 hours and were incarcerated in unsuitable conditions. Defendants contend there is no evidence that Plaintiffs were subjected to unconstitutional conditions amounting to punishment. The summary judgment record evidence does not support Plaintiffs' allegations of due process violations related to the timing of their bail or the conditions of their confinement.

There is no right to post bail within 24 hours of arrest. Mississippi law indicates that this limitation is 48 hours. ***Quinn***, 818 So. 2d at 1152; ***Evans***, 725 So. 2d at 643 n.2. There is no evidence presented by Plaintiffs that their posting bail on Monday morning after being detained on Sunday exceeded the 48-hour limit. The only evidence indicates two judges were brought to the jail Monday morning to bond out detained Plaintiffs.

Likewise, while there is evidence that Copiah County jail exceeded capacity for much of the duration of Plaintiffs' stay, there is nothing to indicate that unsanitary or unsuitable conditions amounting to punishment resulted. Plaintiffs advanced no summary judgment evidence to back their claims that they were not granted mattresses and phone calls during their overnight stay. This Court did not find unconstitutional punishment conditions in ***Hamilton***, 74 F.3d at 106, where a pretrial detainee was denied telephone access, recreation, mail, showers, and sheets for a three-day period; in fact, we affirmed the district court's decision to dismiss Hamilton's § 1983 conditions of confinement claim. ***Id.*** at 107. Similarly, even if we assume as true evidence Plaintiffs have not put forth, detained Plaintiffs who were not granted phone calls and mattresses for a period of less than 24 hours were not subjected to impermissible punishment. If we assume as true evidence Plaintiffs have not put forth, it appears arrested Plaintiffs were merely exposed to a "*de minimis* level of imposition." ***Id.*** at 106.

There is evidence that Ainsworth authorized that Plaintiffs be held until the morning of June 5, 2000. However, the only reasons for the cramped conditions advanced by Defendants, which Plaintiffs have not rebutted, relate to the inability to get judges out to the jail late

on Sunday to post bond and the bad weather conditions. These are legitimate, practical concerns reasonably related to the overcrowding conditions; they easily meet the deferential, rational basis ***Bell*** test. *See* ***Bell***, 441 U.S. at 539; ***Hare***, 74 F.3d at 646.

Taking Plaintiffs' sparse evidence as true, because the evidence does not show that the actions of Sheriff Ainsworth in keeping them overnight at the jail subjected Plaintiffs to conditions of confinement that constitute unconstitutional punishment of pretrial detainees which were not reasonably related to a legitimate government objective, the district court erred in assessing the legal significance of the conduct that the court deemed sufficiently supported for purposes of denying summary judgment based on qualified immunity. Therefore, Ainsworth is entitled to qualified immunity as a matter of law on the Fourteenth Amendment due process claims.

CONCLUSION

Having carefully reviewed the record of this case and the parties' respective briefing and arguments, and for the reasons set forth above, we conclude that Plaintiffs have not materially alleged any clearly established constitutional violations by deputy Defendants; they are entitled to qualified immunity as a matter of law. We also conclude that Plaintiffs have not materially alleged any clearly established Fourteenth Amendment violation by Defendant Sheriff Ainsworth and he is entitled to qualified immunity as a matter of law on this issue. However, Plaintiffs have materially alleged that Ainsworth's conduct in connection with the checkpoints violated clearly established Fourth Amendment law, and this Court finds his

actions objectively unreasonable under the circumstances. Plaintiffs, except Darrell Calender, Priscilla Morris, and Luther Jefferson, have also materially alleged that Ainsworth's conduct violated clearly established First Amendment law, and this Court finds his actions objectively unreasonable under the circumstances. Therefore, we REVERSE the district court's denial of qualified immunity as to all deputy Defendants; we REVERSE the district court's denial of qualified immunity to Sheriff Ainsworth on the Fourteenth Amendment issue, as to all Plaintiffs, and on the First Amendment issue, as to Plaintiffs Calender, Morris, and Jefferson; we AFFIRM the court's denial of qualified immunity as to Sheriff Ainsworth on the Fourth Amendment issue, as to all Plaintiffs, and on the First Amendment issue, as to all Plaintiffs except Calender, Morris, and Jefferson; and we REMAND for proceedings consistent with this opinion.

REVERSED in part, **AFFIRMED** in part, and **REMANDED**.

APPENDIX 6

Amendment I. Freedom of religion, speech and press; peaceful assemblage; petition of grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IV. Search and seizure

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV. Citizenship; privileges and immunities; due process; equal protection; enforcement

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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28 USC § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

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28 USC § 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

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28 USC § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the

law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Acts [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who

is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

---

42 USC § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

---

42 USC § 1988. Proceedings in vindication of civil rights

* * *

(b) Attorney's fees. In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], the Religious Freedom Restoration Act of 1993, title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], or section 40302 of the Violence Against Women Act of 1994[,], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

* * *

RULE 65. INJUNCTIONS

* * *

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them

who receive actual notice of the order by personal service or otherwise.

* * *

APPENDIX 7

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOUSTON COLLINS, JR; SHARLET BELTON COLLINS; ROBERT EARL COLLINS; VELMA JEAN COLLINS; DARRELL CALENDER; LARRY VALLIERE; GREGORY TOLLIVER; SHERMAN TOLLIVER; DWAYNE KEMP, CHRISTOPHER WONG WON, DETRON BENDROSS, BERNARD VERGIS, ASHLEY GRUNDY, and EDDIE YOUNGBLOOD, III, individually and a.k.a 2 Live Crew; TIMOTHY VINCENT YOUNG; PRISCILLA MORRIS; LUTHER JEFFERSON; LEE ESTER CRUMP; and LINDA CHRISTMAS — **PLAINTIFFS**

VS.

FRANK AINSWORTH; COPIAH COUNTY, MISSISSIPPI SHERIFF DEPARTMENT; COPIAH COUNTY, MISSISSIPPI; HINDS COUNTY, MISSISSIPPI SHERIFF DEPARTMENT; RANKIN COUNTY, MISSISSIPPI SHERIFF DEPARTMENT; SIMPSON COUNTY, MISSISSIPPI SHERIFF

CIVIL ACTION NO. 3:01CV81WS

DEPARTMENT, BRUCE KIRBY, CHAD SEALS, TROY DAVIS, TONY HEMPHILL, JOHN GOZA, HAROLD WINTERS, EDDIE GIVENS, WILLIAM BROWN, and JOHN DOE DEFENDANTS "A-Z" **DEFENDANTS**

JURY DEMANDED

COMPLAINT

JURISDICTION AND VENUE

(Filed Feb. 05, 2001)

1. This is an action for declaratory relief, injunctive relief, compensatory damages, and punitive damages brought pursuant to the First, Fourth, Fifth, and Fourteenth Amendment to the United States Constitution, 28 U.S.C. §§ 1331, 1343, 1367, 2201, and 2202, 42 U.S.C. §§ 1983 and 1988, §§ 13, 14, and 23, Miss. Const. (1890), and Mississippi statutory law and common law. The jurisdiction of this Court is invoked pursuant to the First, Fourth, Fifth, and Fourteenth Amendment to the United States Constitution, 28 U.S.C. §§ 1331, 1343, 1367, 2201, and 2202, 42 U.S.C. §§ 1983 and 1988, the Miss. Const. (1890), and Mississippi statutory law and common law.

* * *

APPENDIX 8

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION**

HOUSTON COLLINS, JR; SHARLET BELTON COLLINS; ROBERT EARL COLLINS; VELMA JEAN COLLINS; DARRELL CALENDER; LARRY VALLIERE; GREGORY TOLLIVER; SHERMAN TOLLIVER; DWAYNE KEMP, CHRISTOPHER WONG WON, DETRON BENDROSS, BERNARD VERGIS; ASHLEY GRUNDY, and EDDIE YOUNGBLOOD, III, individually and a.k.a 2 Live Crew; TIMOTHY VINCENT YOUNG; PRISCILLA MORRIS; LUTHER JEFFERSON; LEE ESTER CRUMP; and LINDA CHRISTMAS — **PLAINTIFFS**

VS.

FRANK AINSWORTH; COPIAH COUNTY, MISSISSIPPI SHERIFF DEPARTMENT; COPIAH COUNTY, MISSISSIPPI; HINDS COUNTY, MISSISSIPPI SHERIFF DEPARTMENT; RANKIN COUNTY, MISSISSIPPI SHERIFF DEPARTMENT; SIMPSON COUNTY, MISSISSIPPI SHERIFF

CIVIL ACTION NO. 3:01cv81WS

DEPARTMENT; SMITH COUNTY, MISSISSIPPI SHERIFF DEPARTMENT; JASPER COUNTY, MISSISSIPPI SHERIFF DEPARTMENT; THE CITY OF BROOKHAVEN, MISSISSIPPI; BRUCE KIRBY; CHAD SEALS; TROY DAVIS; TONY HEMPHILL; JOHN GOZA; HAROLD WINTERS; EDDIE GIVENS; WILLIAM BROWN; and JOHN DOE DEFENDANTS "A-Z" **DEFENDANTS**

DECLARATION OF SHARLET BELTON COLLINS

(Filed May 15, 2003)

SHARLET BELTON COLLINS makes the following Declaration pursuant to 28 U.S.C. § 1746:

1. My name is Sharlet Belton Collins, and I am an adult resident citizen of Copiah County, Mississippi, and I am a plaintiff in the above entitled lawsuit.

2. I make this Declaration based on personal knowledge.

3. All of the matters, facts, and things contained in this Declaration are true and correct as herein stated.

4. I want and plan to have a Summer Concert Series at Collins Field on Old Port Gibson Road in Copiah County, Mississippi during the Months of June, July, August, and September, 2003.

5. At those scheduled Summer Concert Series, I plan to have several entertainers, including Rap artists, performing.

6. I plan to have the Rap Group 2 Live Crew perform at the Summer Concert Series at Collins Filed on Old Port Gibson Road in Copiah County, Mississippi.

7. I am afraid that if I have the Summer Concert Series, and if I have the Rap Group 2 Live Crew perform, then Copiah County Sheriff Frank Ainsworth will ask the Sheriffs of Hinds, Rankin, Simpson, Jasper, and Smith Counties to send deputies to perform a driver's license checkpoint and search vehicles and harass people coming to the concert in an effort to stop the concert.

* * *

This the 13th day of May, 2003.

/s/ Sharlet B. Collins
SHARLET BELTON COLLINS

I make this Declaration under penalty of perjury under the laws of the United States of America and all of the facts contained in this Declaration are true and correct as therein stated.

/s/ Sharlet B. Collins
SHARLET BELTON COLLINS

DATED:
05-13-03

APPENDIX 9

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOUSTON COLLINS, JR.; SHARLET BELTON COLLINS; ROBERT EARL COLLINS; VELMA JEAN COLLINS; DARRELL CALENDER; LARRY VALLIERE; GREGORY TOLLIVER; SHERMAN TOLLIVER; DWAYNE KEMP, CHRISTOPHER WONG WON, DETRON BENDROSS, BERNARD VERGIS, ASHLEY GRUNDY, AND EDDIE YOUNGBLOOD, III, individually and a/k/a 2 Live Crew; TIMOTHY VINCENT YOUNG; PRISCILLA MORRIS; LUTHER JEFFERSON; LEE ESTER CRUMP; AND LINDA CHRISTMAS — PLAINTIFFS

V.

CIVIL ACTION
NO. 3:01cv81WS

FRANK AINSWORTH; COPIAH COUNTY, MISSISSIPPI, SHERIFF DEPARTMENT; COPIAH COUNTY, MISSISSIPPI; HINDS COUNTY, MISSISSIPPI, SHERIFF DEPARTMENT; RANKIN COUNTY, MISSISSIPPI, SHERIFF DEPARTMENT; SIMPSON COUNTY, MISSISSIPPI, SHERIFF DEPARTMENT; SMITH COUNTY, MISSISSIPPI, SHERIFF DEPARTMENT; JASPER COUNTY, MISSISSIPPI, SHERIFF DEPARTMENT; THE CITY OF BROOKHAVEN, MISSISSIPPI;

BRUCE KIRBY; CHAD SEALS;
TROY DAVIS; TONY HEMPHILL;
JOHN GOZA; HAROLD WINTERS;
EDDIE GIVENS; WILLIAM BROWN;
AND JOHN DOE DEFENDANTS "A-Z" DEFENDANTS

* * *

DEPOSITION OF FRANK AINSWORTH

Taken at the law offices of Carroll Rhodes, Esq.,
119 Downing Street, Hazlehurst, Mississippi,
on February 19, 2003, beginning at
approximately 2:08 p.m.

* * *

REPORTED BY:
SUZANNE LEE, BS, CSR #1554
Notary Public
Post Office Box 23633
Jackson, Mississippi 39225
601-892-9965

* * *

[24] Q. Okay. Now, prior to June the 4th of 2000, had you called any other law enforcement agency and asked for assistance for June the 4th?

A. Yes, sir.

Q. Okay. Tell us one at a time who you called and what you told them.

A. All right. I think Eddie Givens called Simpson County because he knew E.C. Mullins over there real well. They drove a truck together, and they was lifelong friends. And I – the main thing was that I was going to need some help because there wasn't no way [25] I could take a

handful of deputies and go out there and do anything right.

I think Mr. William Brown called Hinds County. And other than that, I called the rest of them.

Q. Okay, when you say "the rest of them," I need you to tell me –

A. Man, I –

Q. – which county. Which county did you call?

A. I called Smith County and Jasper County.

Q. Did the sheriff of Smith County make a commitment that he was going to send some deputies?

A. Yes, he said he'd send me some, yeah.

Q. Who was – do you remember the sheriff's name?

A. No, sir, not right now, I don't.

Q. Okay. What about the sheriff of Jasper County? Did he make a commitment –

A. I don't remember him either – yes, sir – but he sent somebody. I met those boys at a sheriff's convention – men rather – and they were real nice, but I don't see them every day. My memory is not that good about names.

Q. Okay. But it's okay about the name. I just want to make sure that you asked them about sending somebody –

A. Yes.

[26] Q. – and they made a commitment that they would send somebody?

A. Yes, sir, they did.

Q. Well, you said Deputy Givens called Simpson County, and Deputy Brown called Hinds County. What about Rankin County?

A. I think I called Rankin County, yes, sir.

Q. And did the sheriff of Ranking [sic] County make a commitment to send somebody?

A. Yes, sir.

Q. What did you tell those sheriffs when you called: Smith, Jasper, and Rankin Counties?

A. I just told them what I had and I needed some help and wondered could they help me. They call me and, you know, things when they need some help. And the smaller counties generally help somebody, and your larger counties will help you if you need some help.

Q. Well, did you tell them that it had been advertised on the radio that there was going to be a rock concert on –

A. Yes, sir.

Q. Okay.

A. Yes, sir.

Q. And did you tell them that you expected a lot of unlicensed drivers at this rock concert?

[27] A. Yes, sir.

* * *

APPENDIX 10

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOUSTON COLLINS, JR., ET AL. — PLAINTIFFS

VERSUS — CIVIL ACTION NO. 3:01CV81WS

FRANK AINSWORTH, ET AL. — DEFENDANTS

****

DEPOSITION OF DARRELL CALENDER

****

APPEARANCES NOTED HEREIN

TAKEN AT INSTANCE OF: DEFENDANTS
DATE: DECEMBER 9, 2004
PLACE: LAW OFFICES OF CARROLL RHODES
119 DOWNING STREET
HAZLEHURST, MISSISSIPPI
TIME: 1:24 P.M.

REPORTED BY: TODD J. DAVIS
CSR #1406, RPR

DAVIS COURT REPORTING
Post Office Box 16147
Jackson, Mississippi 39236-6147
(601) 991-0079
www.daviscourtreporting.com

* * *

[19] Q. And could you tell me, how did you learn about the concert?

A. Well, I stay up toward Rankin County towards Jackson. It was on the radio. I heard it was on the radio.

Q. And the advertisement, do you recall what it said?

A. Come down to Houston Collins Field, and we're going to have a – you can bring your lawn [20] chairs and your cooler, and 2 Live Crew going to be entertaining down there. That was my first time even going. Like I said, I'm from Rankin County. You know, I just been working all the week. I just going to go down and just enjoy the festivities and just, you know, have a little fun. But I'm not even from down here in Copiah County.

* * *

APPENDIX 11

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOUSTON COLLINS, JR., ET AL. PLAINTIFFS

VERSUS CIVIL ACTION NO. 3:01CV81WS

FRANK AINSWORTH, ET AL. DEFENDANTS

****

DEPOSITION OF PRISCILLA MORRIS

****

APPEARANCES NOTED HEREIN

TAKEN AT INSTANCE OF: DEFENDANTS
DATE: DECEMBER 20, 2004
PLACE: LAW OFFICES OF CARROLL RHODES
119 DOWNING STREET
HAZLEHURST, MISSISSIPPI
TIME: 2:11 P.M.

REPORTED BY: TODD J. DAVIS
CSR #1406, RPR

DAVIS COURT REPORTING
Post Office Box 16147
Jackson, Mississippi 39236-6147
(601) 991-0079
www.daviscourtreporting.com

* * *

[14] Q. Okay. Now, you were going to a concert, a 2 Live Crew concert, correct?

A. Yes, sir.

* * *

APPENDIX 12

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION
CIVIL ACTION NO. 3:01cv81WS

HOUSTON COLLINS, JR.; SHARLET BENTON COLLINS; ROBERT EARL COLLINS; VELMA JEAN COLLINS; DARRELL CALENDER; LARRY VALLIERE; GREGORY TOLLIVER; SHERMAN TOLLIVER; DWAYNE KEMP, CHRISTOPHER WONG WON, DETRON BENDROSS, BERNARD VERGIS, ASHLEY GRUNDY, and EDDIE YOUNGBLOOD, III, individually and a.k.a. 2 Live Crew; TIMOTHY VENCENT YOUNG; PRISCILLA MORRIS; LUTHER JEFFERSON; LEE ESTER CRUMP; and LINDA CHRISTMAS,

Plaintiffs,

vs.

FRANK AINSWORTH; COPIAH COUNTY, MISSISSIPPI, ET AL.

Defendants.

VIDEOTAPE DEPOSITION OF DWAYNE KEMP
THE PLAINTIFF
TAKEN BY THE DEFENDANTS

DATE: MARCH 25, 2005
TIME: 10:19-11:45 A.M.

* * *

[39] Q What I'm trying to figure out is who told you you don't need to go down to Collins Field.

A Who told us that we didn't need to go to Collins Field?

Q Right.

A The police officers told us that we couldn't go down there.

Q All right. Which officer told you you could [40] not go to Collins Field?

A The lead officer, he told us. He said that nothing wasn't going on out there, it's over. Cause we asked him, well, can we go after that. After that was over he said there ain't nothing go on out here. He stated that, that nothing was happening out here. You all can go wherever, you know what I'm saying. But nothing wasn't happening out there, it was over out there.

Q So you found out from one of the officers that the show down at Collins Field was already over?

A Not already over. It wasn't nothing going on. He wasn't – they weren't allowing anything to happen. There wasn't no show going on here. He said that.

Q Did he say we're not allowing it? Did he say that we've cancelled it?

A He said ain't no show out here today. You're all not doing no show out here. That's what he said. He said that basically. And you know, what I'm thinking is because of all the police officers that we weren't doing any show.

* * *

APPENDIX 13

UNIFORM JUSTICE COURT CASE

FOR

COPIAH COUNTY JUSTICE COURT

CRIMINAL RECORD

DOCKET NO. 134 PAGE NO. 403, 404, 405

DATE FILED 06/05/2000 TRIAL DATE 7/13/2000

THE STATE OF MISSISSIPPI

VS.

Gregg Tolliver

CHARGE(S):

1) Poss. of Beer
2) Poss of Marijuana
3) Contribute to delinquency of minor
4) _____
5) _____

DEFENDANTS PLEA

☐ NOLO CONTENDERE ☐ GUILTY
☒ NOT GUILTY

ATTORNEY FOR DEFENDANT _____

JUDGE'S ORDER

☒ GUILTY (403, 404)
☐ NOT GUILTY
☐ DISMISSED
☐ BOUND OVER
☐ NOT BOUND OVER
☐ NOLLE PROSEQUI
☒ REMAND TO FILE (405)
☐ BOND _____
☐ OTHER _____

OTHER ACTION

☐ INITIAL APPEARANCE ☐ WAIVED ATTORNEY
☐ PRELIMINARY HEARING ☐ APPEALED
☐ WAIVED PRELIMINARY ☐ CHARGES DROPPED
☐ INDICTED ☐ OTHER _____

SENTENCE

☐ FINE _____ ☐ JAIL TIME _____
☐ COST _____ ☐ PROBATION _____
☐ TOTAL _____ ☐ OTHER _____

REMARKS: _____

/s/ Billie B. Smith 7/13/200
JUDGE'S SIGNATURE **DATE**

ORDER

IN THE JUSTICE COURT OF
COPIAH COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VS.

TOLLIVER GREGORY

ATTORNEY FOR DEFENDANT _____

CASE NO.(S) 134-403, 404, 405

THIS CASE HAVING COME ON FOR TRIAL, AND THE DEFENDANT HAVING BEEN CHARGED WITH Possession of Beer, Possession of Marijuana, contributing to the delinquency of a minor AND THE STATE AND DEFENDANT ANNOUNCING READY FOR TRIAL. THE

COURT HAVING HEARD THE EVIDENCE AND TESTIMONY FINDS THE DEFENDANT _____.

THE DEFENDANT IS THEREFORE ORDERED Fined $150 + costs (255.50) Possession of marijuana D.L. suspension, Fined $50 + costs (125.50) = $381.00. Possession of Beer passed to file on contributing delinquency.

Fined $150 + costs	=	255.50
Possession of marijuana D.L. suspension Fined $50 + costs 125.50	=	125.50
		$381.00

Possession of Beer passed to file on contributing delinquency

WITNESS (ES) FOR STATE _____

WITNESS (ES) FOR DEFENSE _____

DONE AND ADJUDGED, THIS THE ~~15th~~ 13th DAY OF ~~June~~ July, 2000.

/s/ Billie B. Smith
JUSTICE COURT JUDGE/
COPIAH COUNTY

APPENDIX 14

UNIFORM JUSTICE COURT CASE

FOR

COPIAH COUNTY JUSTICE COURT

CRIMINAL RECORD

DOCKET NO. 134 PAGE NO. 417, 418

DATE FILED 06/05/2000 TRIAL DATE 7/13/2000

THE STATE OF MISSISSIPPI

VS.

Sherman E. Tolliver

CHARGE(S):

1) Poss. of Beer
2) Poss of Marijuana
3) _____
4) _____
5) _____

DEFENDANTS PLEA

☐ NOLO CONTENDERE ☒ GUILTY
☐ NOT GUILTY

ATTORNEY FOR DEFENDANT _____

JUDGE'S ORDER

☒ GUILTY
☐ NOT GUILTY
☐ DISMISSED
☐ BOUND OVER
☐ NOT BOUND OVER
☐ NOLLE PROSEQUI
☐ REMAND TO FILE
☐ BOND _____
☐ OTHER _____

OTHER ACTION

☐ INITIAL APPEARANCE ☐ WAIVED ATTORNEY
☐ PRELIMINARY HEARING ☐ APPEALED
☐ WAIVED PRELIMINARY ☐ CHARGES DROPPED
☐ INDICTED ☐ OTHER _____

SENTENCE

☐ FINE _____ ☐ JAIL TIME _____
☐ COST _____ ☐ PROBATION _____
☐ TOTAL _____ ☐ OTHER _____

REMARKS: _____

/s/ Billie B. Smith 7/13/2000
JUDGE'S SIGNATURE **DATE**

ORDER

IN THE JUSTICE COURT OF
COPIAH COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VS.

TOLLIVER GREGORY

ATTORNEY FOR DEFENDANT _____

CASE NO.(S) 134-417, 418

THIS CASE HAVING COME ON FOR TRIAL, AND THE DEFENDANT HAVING BEEN CHARGED WITH (1) Possession of Beer, (2) Possession of Marijuana AND THE STATE AND DEFENDANT ANNOUNCING READY FOR

TRIAL. THE COURT HAVING HEARD THE EVIDENCE AND TESTIMONY FINDS THE DEFENDANT _____.

THE DEFENDANT IS THEREFORE ORDERED

(1) Fined $50 + costs = 125.50

(2) Fined $150 + costs D.L. Suspension = 245.50

$371.00

WITNESS (ES) FOR STATE _____

WITNESS (ES) FOR DEFENSE _____

DONE AND ADJUDGED, THIS THE ~~15th~~ 13th DAY OF ~~June~~ July, 2000.

/s/ Billie B. Smith
JUSTICE COURT JUDGE/
COPIAH COUNTY

APPENDIX 15

UNIFORM JUSTICE COURT CASE

FOR

COPIAH COUNTY JUSTICE COURT

CRIMINAL RECORD

DOCKET NO. 133 PAGE NO. 347

DATE FILED _____ TRIAL DATE 6-5-00

THE STATE OF MISSISSIPPI

VS.

Priscilla Moore [sic]

CHARGE(S):

1) Poss. of Beer

2) _____

3) _____

4) _____

5) _____

DEFENDANTS PLEA

☐ NOLO CONTENDERE ☒ GUILTY

☐ NOT GUILTY

ATTORNEY FOR DEFENDANT _____

JUDGE'S ORDER

☒ GUILTY ☐ NOLLE PROSEQUI

☐ NOT GUILTY ☐ REMAND TO FILE

☐ DISMISSED ☐ BOND _____

☐ BOUND OVER ☐ OTHER _____

☐ NOT BOUND OVER

OTHER ACTION

☐ INITIAL APPEARANCE	☐ WAIVED ATTORNEY
☐ PRELIMINARY HEARING	☐ APPEALED
☐ WAIVED PRELIMINARY	☐ CHARGES DROPPED
☐ INDICTED	☐ OTHER _____

SENTENCE

☐ FINE 50.00	☐ JAIL TIME _____
☐ COST 75.50	☐ PROBATION _____
☐ TOTAL 125.50	☐ OTHER _____

REMARKS: _____

/s/ Lillie V. McKenzie -
JUDGE'S SIGNATURE **DATE**

APPENDIX 16

UNIFORM JUSTICE COURT CASE

FOR

COPIAH COUNTY JUSTICE COURT

CRIMINAL RECORD

DOCKET NO. 133 PAGE NO. 327

DATE FILED 06/05/5000 TRIAL DATE 06/05/2000

THE STATE OF MISSISSIPPI

VS.

Luther Jefferson

CHARGE(S):

1) Poss. of Beer
2) _____
3) _____
4) _____
5) _____

DEFENDANTS PLEA

☐ NOLO CONTENDERE ☒ GUILTY
☐ NOT GUILTY

ATTORNEY FOR DEFENDANT _____

JUDGE'S ORDER

☒ GUILTY
☐ NOT GUILTY
☐ DISMISSED
☐ BOUND OVER
☐ NOT BOUND OVER
☐ NOLLE PROSEQUI
☐ REMAND TO FILE
☐ BOND _____
☐ OTHER _____

OTHER ACTION

☐ INITIAL APPEARANCE	☐ WAIVED ATTORNEY
☐ PRELIMINARY HEARING	☐ APPEALED
☐ WAIVED PRELIMINARY	☐ CHARGES DROPPED
☐ INDICTED	☐ OTHER _____

SENTENCE

☒ FINE 50.00	☐ JAIL TIME _____
☒ COST 75.50	☐ PROBATION _____
☒ TOTAL 125.50	☐ OTHER _____

REMARKS: _____

/s/ Lillie V. McKenzie 6/5/2000

JUDGE'S SIGNATURE **DATE**

APPENDIX 17

UNIFORM JUSTICE COURT CASE

FOR

COPIAH COUNTY JUSTICE COURT

TRAFFIC RECORD

DOCKET NO. 133 PAGE NO. 328

DATE FILED 06/05/2000 TRIAL DATE 6/5/2000

THE STATE OF MISSISSIPPI

VS.

Valliere Larry J.

CHARGE(S):

1) No. DL

2) _____

3) _____

4) _____

5) _____

DEFENDANTS PLEA

☐ NOLO CONTENDERE ☒ GUILTY

☐ NOT GUILTY

ATTORNEY FOR DEFENDANT _____

JUDGE'S ORDER

☒ GUILTY	☐ REMAND TO FILE
☐ NOT GUILTY	☐ MASEP
☐ DISMISSED	☐ DDS _____
☐ NOLLE PROSEQUI	☐ OTHER _____

OTHER ACTION

☐ 10 DAY NOTICE	☐ WAIVER OF ATTORNEY
☐ APPEALED	☐ FAILURE TO APPEAR
☐ OTHER _____	☐ CHARGES DROPPED

SENTENCE

☒ FINE 24	☐ JAIL TIME _____
☒ COST 36	☐ PROBATION _____
☒ TOTAL 60	☐ OTHER _____

REMARKS: _____

/s/ Lillie V. McKenzie 6/5/2000

JUDGE'S SIGNATURE **DATE**

APPENDIX 18

ORDER

IN THE JUSTICE COURT OF
COPIAH COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VS.

CALENDAR DARRELL A.

ATTORNEY FOR DEFENDANT _____

CASE NO.(S) 133-381

THIS CASE HAVING COME ON FOR TRIAL, AND THE DEFENDANT HAVING BEEN CHARGED WITH

Littering

AND THE STATE AND DEFENDANT ANNOUNCING READY FOR TRIAL. THE COURT HAVING HEARD THE EVIDENCE AND TESTIMONY FINDS THE DEFENDANT _____.

THE DEFENDANT IS THEREFORE ORDERED

Littering – Pass to file

WITNESS(ES) FOR STATE _____

WITNESS(ES) FOR DEFENSE _____

ORDERED AND ADJUDGED, THIS THE 15TH DAY OF JUNE, 2000

/s/ Lillie [Illegible] McKenzie
JUSTICE COURT JUDGE/
COPIAH COUNTY

No. 05-999

In The Supreme Court of the United States

HOUSTON COLLINS, JR.; SHARLET BELTON COLLINS; ROBERT EARL COLLINS; VELMA JEAN COLLINS; DARRELL CALENDER; LARRY VALLIERE; GREGORY TOLLIVER; SHERMAN TOLLIVER; DWAYNE KEMP, CHRISTOPHER WONG WON, DETRON BENDROSS, BERNARD VERGIS, ASHLEY GRUNDY, and EDDIE YOUNGBLOOD, III, individually and a.k.a. 2 Live Crew; TIMOTHY VINCENT YOUNG; PRISCILLA MORRIS; LUTHER JEFFERSON; LEE ESTER CRUMP; and LINDA CHRISTMAS,

Petitioners,

vs.

FRANK AINSWORTH; COPIAH COUNTY, MISSISSIPPI SHERIFF DEPARTMENT; COPIAH COUNTY, MISSISSIPPI,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. The appellate and trial courts correctly applied the favorable termination requirement of *Heck v. Humphrey*. The question, as applied in this case, does not involve a genuine dispute between the circuits.

2. Is a Sheriff providing deputies to another agency subject to the liability of the other agency? This responding party will not address the second issue presented by petitioners, as it relates to other parties.

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below:

Plaintiff-Petitioners:

1. Houston Collins, Jr.
2. Sharlet Belton Collins
3. Robert Earl Collins
4. Velma Jean Collins
5. Darrell Calender
6. Larry Valliere
7. Gregory Tolliver
8. Sherman Tolliver
9. Dwayne Kemp
10. Christopher Wong Won
11. Detron Bendross
12. Bernard Vergis
13. Ashley Grundy
14. Eddie Youngblood, III
15. Timothy Vincent Young
16. Priscilla Morris
17. Luther Jefferson
18. Lee Ester Crump
19. Linda Christmas

Defendant-Respondents:

1. Frank Ainsworth
2. Copiah County, Mississippi

LIST OF PARTIES – Continued

Dismissed Defendants:

1. Hinds County, Mississippi
2. Rankin County, Mississippi
3. Simpson County, Mississippi
4. Bruce Kirby
5. Chad Seals
6. Troy Davis
7. Tony Hemphill
8. John Goza
9. Harold Winters
10. Eddie Givens
11. William Brown

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STATEMENT REGARDING JURISDICTION

The issues presented do not involve a genuine conflict of law or questions of broad public interest.

CONSTITUTIONAL PROVISIONS INVOLVED

Although the underlying action includes issues touching upon the First Amendment to the United States Constitution, the issues presented before this Court concern only the Fourth Amendment to the United States Constitution, as applied through 42 U.S.C.A. §1983.

STATEMENT OF THE CASE

The defendants Copiah County and Frank Ainsworth, filed motions for summary judgment from the claims asserted by the plaintiffs, Pricilla Morris, Luther Jefferson, Larry Valliere, Gregory Tolliver and Sherman Tolliver. (R 1399-1413). Each of the plaintiffs responded. (R 1442-1512).

The District Court entered an order on March 22, 2005 granting Copiah County's motions for summary judgment. (R 3063-3066).

The petitioner/plaintiffs appealed to the Fifth Circuit which denied the relief requested by the appeal and affirmed the decisions of the District Court (by Order dated December 12, 2005).

The only facts significant to the issues on appeal are confessed by plaintiffs Gregory Tolliver, Sherman Tolliver, Larry Valliere, Pricilla Morris and Luther Jefferson. Each

was convicted or pled guilty to criminal charges before bringing civil suit. None of the charges were reversed or expunged.

Larry Valliere was arrested for driving without a valid driver's license, a misdemeanor. Mr. Valliere pled guilty and paid a fine. (R 2177) He has never challenged his plea.

Gregory Tolliver was arrested and charged with contributing to the delinquency of a minor, possession of beer and possession of marijuana. This plaintiff was found guilty of the charges of possession of beer and marijuana. (R 2031) The plaintiff did not appeal or challenge this verdict.

Sherman Tolliver was arrested and charged with possession of beer. Deputies also seized his .380 caliber pistol. This plaintiff pled guilty. (R 2073-2974) He has not challenged or appealed his plea.

Pricilla Morris and Luther Jefferson each pled guilty to charges stemming from their arrests, and neither challenged the judgments entered against them. (R 2131 and R 2196)

Additionally, the plaintiff-petitioners' petition for writ of certiorari suggests that certain facts not relevant to the issues within the petition are true. They are not. For the purpose of preserving the right to oppose these facts, pursuant to Supreme Court Rule 15(2), the following are contested facts:

1. A sixth arrested defendant, Darrell Callender, who was not dismissed from this action, was not absolved of his crimes, as suggested by the petitioner. The charges against him were merely remanded.

2. The concert was not cancelled by the Sheriff, as suggested by the plaintiff. The concert was cancelled as a result of rain, as determined by concert promoter Sharlott Collins. (R 1033). No defendant or deputy cancelled the show. (R 1013).

3. The purpose of the checkpoint was not improper as argued by the petitioner. No solicitation of a bribe was ever attempted by any defendant. (R 1919). The actions of the defendants were not intended to suppress speech. (R 1922). Sheriff Ainsworth did seek and obtain an attorney's opinion regarding checkpoints before it was held. (R 935).

4. The conditions of the jail were reasonable as a matter of law, despite the facts suggested. (Petitioner Appendix pages 40-42).

REASONS FOR DENYING WRIT

Each of the five dismissed plaintiffs was convicted or pled guilty in criminal proceedings arising out of, or near to, the driver's license checkpoint established by Copiah County on June 4, 2000. None of these Plaintiffs have had their criminal convictions reversed or otherwise expunged. The convictions necessarily imply that the roadblock from which these arrests stem was valid and that any suit brought under 42 U.S.C. §1983 which would challenge or imply the invalidity of those convictions is barred under *Heck v. Humphries*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 3 (1994).

In *Heck v. Humphries*, the Supreme Court specifically held that, in order for a plaintiff to successfully recover on a §1983 claim for allegedly unconstitutional harm that

would render a conviction or sentence invalid, she must prove that the conviction or sentence has been reversed, expunged or declared invalid. When the conviction has not been overturned, the Plaintiff's claim is not cognizable under §1983. *Id.* at 487.

In this instance, these Plaintiffs were convicted of charges stemming from their arrest at or near the Copiah County driver's license checkpoint. All charges stemming from the arrest were the product of the stop at the checkpoint.

The petitioners argue that their petition should be granted, pursuant to Supreme Court dicta and dissent, in *Spencer v. Kemna*, 522 U.S. 1 (1998). Yet, the petitioner in *Spencer v. Kemna* did not challenge his underlying conviction. At issue in that case was the constitutionality of an order revoking probation. Therefore, the dicta and dissent which the petitioners rely upon never turned to the settled question in *Heck*. In Spencer, even if the Court found that the question was not moot, the resolution would not have created the potential for a divergent result or a finding that the underlying criminal conviction was invalid.

The Fifth Circuit, in this instance, correctly applied the Supreme Court's holdings in *Heck* and *Spencer*.

Further, the plaintiff argues that a conflict exists between the Circuit Courts of Appeal on the application of *Heck v. Humphries*, suggesting that some jurisdictions do not require a favorable termination of the criminal action before the filing of a suit under 42 U.S.C.A. §1983.

The petitioner concedes that the Fifth Circuit follows the termination requirement as described in *Randall v. Johnson*, 227 F.3d 300 (2000), where an inmate, who was

no longer in custody was unable to recover under 42 U.S.C. §1983, absent a showing that an authorized tribunal had overturned or otherwise expunged his conviction. *Id.* The plaintiff also acknowledges that several other circuits follow this line.

Yet, to demonstrate a difference in opinion between the circuits, the petitioner cites *Jenkins v. Haubert*, 179 F.3d 19 (2nd Cir. 1999); *DeWalt v. Carter*, 224 F.3d 607 (7th Cir. 2000); *Abusai v. Hillsburough*, 405 F.3d 1298 (11th Cir. 2005); and *Brown v. Plaut*, 131 F.3d 163 (D.C. Cir. 1997). However, none of those cases implicate the validity of facts surrounding conviction. In the case of *Muhammad v. Close*, 450 U.S. 749 (2004), the Supreme Court has addressed the conflict which existed within the Circuits, where the fact or duration of sentence was not implicated.

Muhammad appealed to the United States Supreme Court, after the Sixth Circuit Court of Appeals held the action barred by *Heck* because Muhammad had sought, among other relief, the expungement of a misconduct charge from his prison record. The Court stated:

> " . . . Relying upon Circuit precedent, see *Huey v. Stine*, 230 F.3d 226 (2000), the Court of Appeals held that an action under Sec. 1983 to expunge his misconduct charge and for other relief occasioned by the misconduct proceedings could be brought only after satisfying *Heck's* favorable termination requirement. The Circuit thus maintained a split on the applicability of *Heck* to prison disciplinary proceedings in the absence of any implication going to the fact or duration of underlying sentence, four Circuits having taken the contrary view. See *Leamer v. Fauver*, 288 F.3d 532, 542, 544 (CA3 2002); *DeWalt v. Carter*,

224 F.3d 607, 613 (CA7 2000); *Jenkins v. Haubert*, 179 F.3d 19, 27 (CA2 1999); *Brown v. Plaut*, 131 F.3d 163, 167, 169 (CADC 1997). . . ." *Id.*

Because the *Muhammad* petitioner, by amendment, in fact did not seek to invalidate the underlying conviction, that case was remanded for rulings consistent with the facts as pled. However, the nature of the conflict between the Circuits was clear. A conflict between Circuits may have existed in regard to applying *Heck* to post conviction probation issues but not as to the underlying criminal convictions.

In 2005, any ambiguity between the Circuits was removed when the question of the validity of *Heck* was brought before the Supreme Court in the case of *Wilkenson v. Dotson*, 544 U.S. 74 (2005). It was again held that such suits for damages or injunction, are controlled by *Heck* reasoning, and only where a result would not invalidate the conviction may it proceed. As stated:

" . . . *Heck* specifies that a prisoner cannot use §1983 to obtain damages where success would necessarily imply the unlawfulness of a (not previously invalidated) conviction or sentence. And *Balisok*, like *Wolff*, demonstrates that habeas remedies do not displace §1983 actions where success in the civil rights suit would not necessarily vitiate the legality of (non previously invalidated) state confinement. These cases, taken together, indicate that a state prisoner's §1983 action is barred (absent prior invalidation) – no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings) – if success in that action

would necessarily demonstrate the invalidity of confinement or its duration."

The *Wilkenson* petitioners' requests for prospective injunctive parole relief, did not affect the underlying charges, and they were permitted to proceed. However, in the case at bar, this petition does challenge the underlying conviction. The Appeals Court was correct.

CONCLUSION

The petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED, this the 28th day of February, 2006.

Respondents, Frank Ainsworth,
and Copiah County

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(4)

No. 05-999

In the Supreme Court of the United States

HOUSTON COLLINS, JR., et al.,
Petitioners,

v.

HINDS COUNTY SHERIFF'S DEPARTMENT and
RANKIN COUNTY SHERIFF'S DEPARTMENT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Is the favorable termination requirement of *Heck v. Humphrey* applicable to parties who have been convicted of misdemeanors?

2. Should an injunction apply to two sheriffs departments that assisted another sheriff in conducting driver's license checkpoints, if the two assisting sheriff departments are unaware of any improper purpose behind the establishment of the checkpoints?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below:

Plaintiff-Petitioners:

1. Houston Collins, Jr.
2. Sharlet Belton Collins
3. Robert Earl Collins
4. Velma Jean Collins
5. Darrell Calender
6. Larry Valliere
7. Gregory Tolliver
8. Sherman Tolliver
9. Dwayne Kemp
10. Christopher Wong Won
11. Detron Bendross
12. Bernard Vergis
13. Ashley Grundy
14. Eddie Youngblood, III
15. Timothy Vincent Young
16. Priscilla Morris
17. Luther Jefferson
18. Lee Ester Crump
19. Linda Christmas

Defendant-Respondents:

1. Frank Ainsworth
2. Copiah County, Mississippi

STATEMENT REGARDING JURISDICTION

These Respondents do not believe this case is properly before this Court as the issues presented do not involve a genuine conflict of law or questions between the Circuit Courts of Appeal, nor is there a question of broad public interest.

CONSTITUTIONAL PROVISIONS INVOLVED

The underlying action includes issues related to the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §§1983 and 1988. However, the matters on appeal to this Court concern only the Fourth Amendment to the United States Constitution, as applied through 42 U.S.C. §1983.

STATEMENT OF THE CASE

The only facts significant to the issues on appeal are confessed by Petitioners Gregory Tolliver, Sherman Tolliver, Larry Valliere, Pricilla Morris and Luther Jefferson. Each of the petitioners was convicted or pled guilty to criminal charges before bringing civil suit. None of the charges were reversed or expunged.

On June 4, 2000, the Petitioners were stopped at a roadblock in Copiah County, Mississippi. Larry Valliere was arrested for driving without a valid driver's license, a misdemeanor. Mr. Valliere pled guilty and paid a fine. (R. 2177) He never challenged his plea. Gregory Tolliver was arrested and charged with contributing to the delinquency of a minor, possession of beer and possession of marijuana. Mr. Tolliver was found guilty of the charges of possession of beer and marijuana. (R. 2031) He did not appeal or challenge this

verdict. Sherman Tolliver was arrested and charged with possession of beer. Deputies also seized his .380 caliber pistol. Mr. Tolliver pled guilty. (R. 2073-2974) He has not challenged or appealed his plea. Pricilla Morris and Luther Jefferson each pled guilty to charges stemming from their arrests, and neither challenged the judgments entered against them. (R. 2131 and R. 2196)

On February 5, 2001, Houston Collins, Jr., Sharlet Belton Collins, Robert Earl Collins, Velma Jean Collins, Darrell Calender, Larry Valliere, Gregory Tolliver, Sherman Tolliver, Timothy Vincent Young, Priscilla Morris, Luther Jefferson, Lee Ester Crump, Linda Christmas, and Dwayne Kemp, Christopher Wong Won, Detron Bendross, Bernard Vergis, Ashley Grundy, Eddie Youngblood, III, individually and as 2 Live Crew (sometimes hereinafter collectively referred to as "Petitioners") filed a complaint alleging civil rights violations including First and Fourth Amendment claims. Additionally, they sought the imposition of preliminary and permanent injunctions to prevent these Respondents from denying, in advance their use of Collins Field (a venue in Copiah County, Mississippi) as a forum for conducting future outdoor concert(s) without enacting proper safeguards. (R. at 2975) The injunction the Petitioners sought was as to all Respondents for any future, yet unplanned events to be held at this Copiah County venue.

On May 22, 2003, the District Court granted several individual Respondents' Motion for Summary Judgment on the grounds of qualified immunity. The Petitioners appealed the District Court's decision. On June 4, 2003, the Fifth Circuit Court of Appeals affirmed the District Court in part, reversed the District Court in part, and remanded the case for further proceedings.

The Hinds County Sheriff's Department and the Rankin County Sheriff's Department (sometimes hereinafter collectively referred to as "these Respondents") filed a Motion to Dismiss or for Summary Judgment on February 28, 2005. On March 15, 2005, following a concession and judicial admission by Petitioners' regarding the absence of liability on the part of these Respondents, the District Court properly granted summary judgment as to all claims, including the claims for a permanent injunction, in favor of these Respondents. (R. at 3055-56)

Despite the Petitioners' admission and confession to the District Court that these Respondents had no liability unto the Petitioners on the merits, the Petitioners appealed the District Court's refusal to impose a permanent injunction upon the Hinds County Sheriff's Department and the Rankin County Sheriff's Department. The Fifth Circuit denied the relief requested by the appeal and affirmed the decisions of the District Court in an Order dated December 12, 2005.

The Petitioners now again raise these same issues in their Writ of Certiorari. Further, the petition for Writ of Certiorari suggests that certain facts not relevant to the issues within the petition are true. They are not. For the purpose of preserving the right to oppose these facts, pursuant to Supreme Court Rule 15(2), the following are contested facts:

1. A sixth arrested defendant, Darrell Callender, who was not dismissed from this action, was not absolved of his crimes, as suggested by the Petitioners. The charges against him were only remanded.

2. The concert was not cancelled by the Sheriff, as suggested by the Petitioners. The concert was cancelled as a result of rain, as determined by concert promoter Sharlott

Collins. (R. 1033). No defendant or deputy cancelled the show. (R. 1013)

3. The purpose of the checkpoint was not improper as argued by the Petitioners. No solicitation of a bribe was ever attempted by any Respondent. (R. 1919). The actions of the defendants were not intended to suppress speech. (R. 1922). Sheriff Ainsworth sought and obtained an attorney's opinion regarding checkpoints before it was held. (R. 935)

SUPPORT FOR THE DENIAL OF PETITIONERS WRIT OF CERTIORARI

I. The Appellate and Trial Courts correctly applied the favorable termination requirement of *Heck v. Humphrey*.

Each of the Petitioners was convicted or pled guilty in criminal proceedings arising out of, or near to, the driver's license checkpoint established by, and located within, Copiah County, Mississippi, on June 4, 2000. None of their criminal convictions were reversed or expunged. These very convictions support the fact the roadblock from which the arrests stem was valid and that any suit brought under 42 U.S.C. §1983 which would challenge or imply the invalidity of those convictions is barred under *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2.d 3 (1994).

In *Heck v. Humphrey*, the United States Supreme Court specifically held that in order for a plaintiff to successfully recover on a § 1983 claim for an allegedly unconstitutional harm that would render a conviction or sentence invalid, (s)he must prove that the conviction or sentence issued to said plaintiff has been reversed, expunged or declared invalid.

When the conviction has not been overturned, the plaintiff's claim is not cognizable under § 1983. *Id.* at 487.

In the matter presently before the Court, the Petitioners were convicted of charges stemming from their arrest at or near the Copiah County, Mississippi, driver's license checkpoint. All charges stemming from the arrest were the product of this stop.

The Petitioners argue that their Petition for Writ of Certiorari should be granted pursuant to dicta and dissent within *Spencer v. Kemna*, 522 U.S. 1 (1998). However, this case does not develop out of the same situations as those in *Spencer,* and therefore the dicta and dissent in *Spencer* are not applicable. At issue in *Spencer* was the constitutionality of an order revoking probation and did not challenge the Petitioner's underlying conviction. The dicta and dissent which the Petitioners in this case rely upon never turned to the settled question in *Heck*. In *Spencer*, even if the Court had not found the question moot, the resolution would not have created the potential for a divergent result or a finding that the underlying criminal conviction was invalid. Thus, the Fifth Circuit, in this instance, correctly applied the Supreme Court's holdings in *Heck* and *Spencer*.

Further, the Petitioners in the present case argue that a conflict exists between the Circuit Courts of Appeal on the application of *Heck v. Humphrey*, suggesting that some jurisdictions do not require a favorable termination of the criminal action before the filing of a suit under 42 U.S.C. §1983.

The Petitioners concede that the Fifth Circuit follows the termination requirement as described in *Randall v. Johnson*, 227 F. 3d 300 (2000), where an inmate who was no longer in

custody was unable to recover under 42 U.S.C. §1983, absent a showing that an authorized tribunal had overturned or otherwise expunged his conviction. *Id.* The Petitioners also acknowledge that several other circuits follow this line of authority.

To demonstrate a difference in opinion between the circuits, the petitioners cite *Jenkins v. Haubert*, 179 F. 3d 19 (2d Cir. 1999); *DeWalt v. Carter*, 224 F. 3d 607 (7th Cir. 2000); *Abusai v. Hillsburough*, 405 F. 3d 1298 (11th Cir. 2005); and *Brown v. Plaut*, 131 F. 3d 163 (D.C. 1997). None of these cases implicate the validity of facts surrounding conviction. In the case of *Muhammad v. Close*, 450 U.S. 749 (2004), the Supreme Court has addressed the conflict which existed within the Circuits, where the fact or duration of sentence was not implicated.

Muhammad appealed to the United States Supreme Court, after the Sixth Circuit Court of Appeals held the action was barred by *Heck* because Muhammad had sought, among other relief, the expungement of a misconduct charge from his prison record. The Court stated:

> "...Relying upon Circuit precedent, see *Huey v. Stine*, 230 F. 3d 226 (2000), the Court of Appeals held that an action under Sec. 1983 to expunge his misconduct charge and for other relief occasioned by the misconduct proceedings could be brought only after satisfying *Heck's* favorable termination requirement. The Circuit thus maintained a split on the applicability of *Heck* to prison disciplinary proceedings in the absence of any implication going to the fact or duration of underlying sentence, four Circuits having taken the contrary view. See *Leamer v. Fauver*, 288 F.3d 532, 542, 544 (CA3 2002); *DeWalt v. Carter*,

224 F.3d 607, 613 (CA7 2000); *Jenkins v. Haubert*, 179 F.3d 19, 27 (CA2 1999); *Brown v. Plaut*, 131 D.3d 163, 167, 169 (CADC 1997). ..." *Id.*

Because the *Muhammad* petitioner, by amendment, did not seek to invalidate the underlying conviction, that case was remanded for rulings consistent with the facts as pled. However, the nature of the conflict between the Circuits was clear. A conflict between Circuits may have existed in regard to applying *Heck* to *post conviction probation* issues, but not as to the underlying criminal convictions.

In 2005, the question of the validity of *Heck* was brought before this Court in the case of *Wilkinson v. Dotson*, 544 U.S. 74 (2005). This Court clearly held that suits for damages or injunction are controlled by *Heck* reasoning, and only where a result would not invalidate the conviction may it proceed. The Court held:

"...*Heck* specifies that a prisoner cannot use §1983 to obtain damages where success would necessarily imply the unlawfulness of a (not previously invalidated) conviction or sentence. And *Balisok*, like *Wolff*, demonstrates that habeas remedies do not displace §1983 actions where success in the civil rights suit would not necessarily vitiate the legality of (non previously invalidated) state confinement. These cases, taken together, indicate that a state prisoner's §1983 action is barred (absent prior invalidation)-no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)-if success in that action would

> necessarily demonstrate the invalidity of confinement or its duration."

Wilkinson, 544 U.S. 74 (2005).

The *Wilkinson* petitioners' requests for prospective injunctive parole relief did not affect the underlying charges, and they were permitted to proceed. However, in the case at bar, this petition *does* challenge the underlying conviction. Thus, the Fifth Circuit Court of Appeals was correct and this issue should not again need to come before the United States Supreme Court.

II. The imposition of an injunction against the Hinds and Rankin County Sheriff's Departments should not be issued, as these Petitioners have been precluded by judicial estoppel from arguing for injunctions against these Respondents and there is no support in law, fact or public interest for any injunction against them.

A. These Respondents have been dismissed with prejudice and the petitioners are judicially estopped from arguing for injunctions against these Respondents.

The Petitioners claim that they are entitled to an injunction to prevent these Respondents from denying them, in advance, from using Collins Field in Copiah County, Mississippi, as a forum for conducting an outdoor concert, without enacting proper safeguards. (R. at 2975).

Neither the Hinds County Sheriff's Department or the Rankin County Sheriff's Department have jurisdiction to deny the use of this field, and the Petitioners confessed to the District Court that neither could possibly be liable unto the

Petitioners. Accordingly, on March 15, 2005, the District Court dismissed the Hinds County Sheriff's Department and the Rankin County Sheriff's Department from this case, with prejudice.

The Petitioners' claim that an injunction can be imposed against these Respondents directly conflicts with their earlier representations to the lower courts and the subsequent dismissal of these Respondents on the merits. The District Court clearly took the Petitioners' position and admission into consideration when dismissing these two sheriff's departments on the merits, as evidenced by the court's direct *reference to Petitioners concession that no liability exists against these Respondents in its March 15, 2005, Order*. (R. at 3055). The Petitioners are judicially estopped from adopting on appeal the clearly inconsistent judicial position that an injunction could be and should be issued against these Respondents.

B. There is no support for an injunction against the Hinds County Sheriff's Department or the Rankin County Sheriff's Department in case law or public interest.

In their Writ of Certiorari, the Petitioners seek injunctive relief as to two sheriff's departments that have not only been dismissed from the case on the merits, but do not have independent jurisdiction in the county where the incident of issue occurred and do not have authority within that county aside from what is granted by the county itself. The Petitioners are not seeking to conduct any future activity in either Hinds or Rankin Counties, wherein these two sheriffs' departments have jurisdiction. Collins Field, the area for which the petitioners sought protection through an injunction is located in *Copiah County*. Neither the Hinds County

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Sheriff's Department nor the Rankin County Sheriff's Department establishes custom, policy, or procedure in the county where Collins Field is located. Mississippi statutes, like the common law, confine the authority and duties of the sheriff to the county for which he was elected. *McLean v. State of Mississippi ex. rel. Roy*, 96 F.2d 741, 744-45 (5th Cir. 1938). The injunction being sought against these Respondents is not only for future actions towards which these Respondents have shown no predisposition or intent but also centered upon hypothetical future events in a location, outside of Hinds' or Rankin's enforcement jurisdiction.

In order to have a preliminary injunction the following requisites must be met:

> A preliminary injunction is an extraordinary equitable remedy that may be granted only if the plaintiff establishes four elements: (1) a substantial likelihood of success on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is denied; (3) that the threatened injury outweighs any damage that the injunction might cause the defendant; and (4) that the injunction will not disserve the public interest.

Sunbeam Products, Inc. v. West Bend Co., 123 F.3d 246, 250 (5th Cir. 1997) (citation omitted) (overturned on other grounds). The requirements for the imposition of a permanent injunction are essentially the same as for a preliminary injunction, except the petitioners must show actual success on the merits. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 107 S.Ct. 1396, 94 L. Ed. 2d. 542, 546 (1987). These Respondents were dismissed with prejudice by the District Court, and Petitioners cannot and did not have actual success on the merits with regard to any

claims against these two entities. Accordingly, their motion for a permanent injunction was properly denied by the lower courts.

As was acknowledged by counsel for the Petitioners' during oral argument on the Defendant-Respondents' Motion for Summary Judgment, the alleged injuries which the Petitioners complained of did not occur because of any action or omission or as the result of a custom, policy, or practice of either of these Respondents. (R. at 6, R. at 1669, R. at 3055-56). Similarly, the events complained of did not occur within either Hinds County or Rankin County, Mississippi These Respondents made clear that there is no custom, policy, or practice which resulted in the supposed injuries suffered by the Petitioners. (R. at 1605, R. at 1647-48). None of the Petitioners identified or established any actionable behavior on the part of these Respondents. Significantly, the Petitioners acknowledged that any members of the Hinds County Sheriff's Department and the Rankin County Sheriff's Department who responded to Sheriff Ainsworth's call for assistance were deputized by the Sheriff into the Copiah County Sheriff's Department. (R. at 2979). Individually, the extent of any of the Petitioners' allegations against either of these Respondents was that their employees, *after being deputized to act for another sheriff's department*, participated in checking to make sure the operators of motor vehicles held a proper license. The Petitioners have acknowledged that any actions which could have been taken by either the Hinds or Rankin County Sheriff's Departments would have been on behalf of the Copiah County Sheriff's Department (and, axiomatically, not on behalf of Hinds or Rankin) which had deputized them into its force and was supervising and directing any deputized officers.

Petitioners have failed to show that there is any substantial threat that they will suffer irreparable injury if an injunction is not issued against these Respondents. There is no substantial risk that any custom, policy or practice of these Respondents may lead to an injury to the Petitioners, given that the petitioners acknowledged that the injuries they supposedly suffered were not the result of any action, omission, or custom, policy, or practice of the Hinds County Sheriff's Department or the Rankin County Sheriff's Department nor is there any evidence of conspiracy or anticipated future concentrated action. (R. at 6). This Court has made clear that the mere loss of income does not constitute irreparable harm. *Sampson v. Murray*, 415 U.S. 61, 90-92, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974). Here, the Petitioners simply allege that they will lose the opportunity for profit if the request for an injunction is denied. As to the Hinds and Rankin County Sheriff's Departments, this is clearly not true since neither department has jurisdiction in the venue at issue. Further, where a party cannot demonstrate that a harm will occur which cannot be compensated for by money damages, the party cannot satisfy the requirement of irreparable harm necessary to sustain injunctive relief. The Petitioners have not shown that the denial of injunction would cause them to suffer any injury let alone one which could not be compensated by a monetary award. Therefore, there is no need or justification for the imposition of an injunction against either the Hinds County Sheriff's Department or the Rankin County Sheriff's Department.

The Petitioners made a conclusory allegation that one of the Petitioners will suffer irreparable injury because she plans to have future concerts at the subject venue *in Copiah County, Mississippi*. Disregarding the fact that money damages would be able to fully compensate her for any supposed injury, the

Petitioners have specifically disavowed that any action, omission, or custom, policy, or practice resulted in the alleged injuries supposedly suffered by the petitioners. (R. at 6, R at. 3055). This position was demonstrated throughout the discovery process. When asked who was the *sole* policy-maker concerning the complained of driver's license checkpoints, Sheriff Ainsworth made it abundantly clear that he was the only person making decisions concerning the existence and operation of the driver's license checkpoints. (R. at 1669). In addition, Sheriff Ainsworth stated that he deputized all law enforcement personnel from other jurisdictions, making them members of the Copiah County Sheriff's Department during the course of their actions on June 4, 2000. (R. at 1670). Any alleged participation by employees of the Hinds County Sheriff's Department or the Rankin County Sheriff's Department was necessarily performed on behalf of Copiah County, Mississippi, after they were deputized for the Copiah County Sheriff's Department. The Copiah County Sheriff's Department, in responding to Interrogatories propounded by the Petitioners, stated that Sheriff Frank Ainsworth is the only person who gave any instructions concerning the driver's license checkpoints. (R. at 1650). It has repeatedly been made obvious during discovery that neither the Hinds County Sheriff's Department, the Rankin County Sheriff's Department, nor any of their employees played any part in the formulation or implementation of the custom, policy, or practice which allegedly resulted in injury to the petitioners. These Respondents had no knowledge of any improper purpose and had no intentions of supporting any improper purpose. It is not possible that they create a substantial risk, now or in the future, to the Petitioners.

In their Writ of Certiorari the Petitioners argue that the imposition of an injunction against these Respondents is

proper because members of both the Hinds County Sheriff's Department and the Rankin County Sheriff's Department assisted the Copiah County Sheriff's Department. Of critical importance to this matter is that the Respondents acted only after being deputized by Copiah County. (Interestingly, Petitioners do no seek injunctions against any of the other entities that assisted Copiah County which and were also dismissed upon summary judgment by the District Court.) All actions that were taken were in Copiah County, under the direction and as part of of the Copiah County Sheriff's Department. To issue an injunction against these particular Respondents would not serve the public interest. Rather, it is in the public interest to for departments to assist their neighbors in public safety and law enforcement matters. An injunction in a situation such as this one would chill and discourage departments from assisting others in lawful and permissible, and potentially critical, law enforcement activities.

C. There is not a conflict between the Circuits as to the issuance of an injunction against law enforcement departments who assist other departments without knowledge of any problematic purpose.

Petitioners Writ for Certiorari contends that the Fifth Circuit's ruling that these Respondents' lending of deputies to Copiah County is insufficient for an injunction is in conflict with other Circuit court holdings, and thus ripe for adjudication before the U.S. Supreme Court. It is not. The only conflict between the Circuits cited by the Petitioners is the alleged conflict between the Fifth Circuit ruling in the underlying case and the ruling of the United States Court of Appeals for the Eleventh Circuit in *Council for Periodical Distributors Associations v. Evan*, 827 F.2d 1483 (11th Cir.

1987). However, contrary to the Petitioners' assertions, these two cases are not the same. In *Council for Periodical Distributors Association*, the City of Montgomery, Alabama, and its police chief had assigned a city police officer to assist the Montgomery County District Attorney in his efforts to form a task force whose purpose was to block the sale of allegedly obscene magazines in his jurisdiction, which included the City of Montgomery. *Council for Periodical Distributors Associations*, 827 F.2d 1483, at 1485, (11th Cir. 1987). At the request of the District Attorney, the Chief of Police for Montgomery assigned a city police officer to join the task force. *The City of Montgomery was aware of the purpose of the task force at its inception and the officer assigned to the task force was present at a meeting wherein the District Attorney threatened prosecution for the continued sale of the magazines in issue*. Unlike the Hinds and Rankin County Sheriff's Departments, the City of Montgomery was aware of a clearly intended prior restraint *before* participating in the task force. Unlike the City of Montgomery, the Hinds County and Rankin County Sheriff's Departments did not engage in the coordination of, nor have any general knowledge of a problematic purpose or prior restraint connected to the roadblocks for which they were temporarily deputized. Further, the Petitioners in the present case were convicted of the very offenses which the roadblocks were, to the knowledge of these Respondents, set up to address. To compare these Respondents with the City of Montgomery, an entity that was actively involved in the planning and participation of a prior restraint, is not proper. These two cases are not similar and there is not a dispute between Circuits in this matter.

III. Request for Damages

The Hinds County and Rankin County Sheriff's Departments seek awards of damages from the Petitioners for the filing of a clearly frivolous appeal as to these two Respondents. The Supreme Court Rules provide that where a petition for a writ of certiorari, an appeal, or application for other relief is frivolous, the Court may award the respondent or appellee just damages and single or double costs. S. Ct. Rule 42.2.

A frivolous appeal is one presenting no justiciable question or one so readily recognizable as devoid of merit on the face of the record that there is little if any prospect that it can ever succeed. *Clifford v. Eastern Mortgage & Security Co.*, 166 So. 562, 123 Fla. 180 (Fla. 1936).

The Petitioners have brought an appeal before this Court for an injunction against the Hinds and Rankin County Sheriff's Departments despite the fact both of these Respondents have been dismissed on summary judgment. The Petitioners themselves have acknowledged to the lower courts that no liability exists as these two departments, thus the possibility of any success on the merits against these departments is not merely unlikely, but assuredly so. As these Departments have no liability and an injunction is not appropriate, the judgment of the lower courts should be upheld.

When a judgment is affirmed by the United States Supreme Court or a United States Court of Appeals, the court, in its discretion, may adjudge to the prevailing party just damages for that party's delay, and single or double costs. 28 USCA § 1912. In *Roussel v. Hutton*, 638 So.2d. 1305 (Miss. 1994) the sanctions were lured against an

appellant against whom summary judgment had been entered at trial. The appellant had been found to have no hope of success on appeal and the appeal was considered, therefore, to be frivolous. Similarly, the Petitioners in this case have no hope of success on appeal and their Writ of Certiorari, as brought against the Hinds and Rankin County Sherriff's. The Departments are frivolous. Accordingly, damages are warranted.

CONCLUSION

The Petitioners have failed to show that success on the merits or any potential thereof; in fact, the Petitioners have expressly confessed to the District Judge that there is no basis for the imposition of liability against the Hinds County Sheriff's Department or the Rankin County Sheriff's Department. The Petitioners are now judicially estopped from arguing otherwise. The Petitioners did not show they will suffer irreparable injury if an injunction is not granted, and an imposition of an injunction would actually be contrary to, not for, the public interest. For all these reasons, and because there is no conflict between the Circuit Courts of Appeal, Petitioners' Writ of Certiorari should be denied with an award of damages to these Appellees.

RESPECTFULLY SUBMITTED, this the 10th day of March, 2006.

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Appellees/Defendants,
HINDS COUNTY SHERIFF'S DEPARTMENT AND RANKIN COUNTY SHERIFF'S DEPARTMENT

(3)

No. 05-999

In The
Supreme Court of the United States

HOUSTON COLLINS, JR.; SHARLET BELTON COLLINS; ROBERT EARL COLLINS; VELMA JEAN COLLINS; DARRELL CALENDER; LARRY VALLIERE; GREGORY TOLLIVER; SHERMAN TOLLIVER; DWAYNE KEMP, CHRISTOPHER WONG WON, DETRON BENDROSS, BERNARD VERGIS, ASHLEY GRUNDY, and EDDIE YOUNGBLOOD, III, individually and a.k.a 2 Live Crew; TIMOTHY VINCENT YOUNG; PRISCILLA MORRIS; LUTHER JEFFERSON; LEE ESTER CRUMP; and LINDA CHRISTMAS,

Petitioners,

vs.

FRANK AINSWORTH; COPIAH COUNTY, MISSISSIPPI, SHERIFF DEPARTMENT; COPIAH COUNTY, MISSISSIPPI; HINDS COUNTY, MISSISSIPPI SHERIFF DEPARTMENT; and RANKIN COUNTY, MISSISSIPPI SHERIFF DEPARTMENT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PETITIONERS' REPLY

Since *Spencer v. Kemna*, 523 U.S. 1 (1998), in which five Justices expressed their views that *Heck v. Humphrey*, 512 U.S. 477 (1994), does not apply to plaintiffs who are not in custody and therefore have no remedy under the habeas statute, there has been open disagreement among the circuits on this issue. This Court should grant certiorari to resolve this unsettled, important question.

1. Respondents try to distinguish the circuit court cases cited by Petitioner in order to argue that there is no conflict among the circuits on the question presented.[1] In particular, they point out that in *Jenkins v. Haubert*, 179 F.3d 19 (2d Cir. 1999), *DeWalt v. Carter*, 224 F.3d 607 (7th Cir. 2000), *Abusaid v. Hillsborough County Board of County Commissioners*, 405 F.3d 1298 (11th Cir. 2005), and *Brown v. Plaut*, 131 F.3d 163 (D.C. Cir. 1997), the plaintiffs were not challenging facts surrounding their underlying convictions. However, Respondents ignore that in the three of these cases that were decided after *Spencer*, the court explicitly cited the views of the five concurring and dissenting Justices in *Spencer* in holding that 42 U.S.C. § 1983 was available to the plaintiffs. *See Abusaid*, 131 F.3d at 1315 n.9 (pointing out that five justices in *Spencer* "expressed the view that 42 U.S.C. § 1983 claims are barred only when the alternative remedy of habeas relief is available"); *DeWalt*, 224 F.3d at 616-17 (expressing

[1] Respondents also disagree with certain facts contained in the Petition that are not germane to the question for review. However, there is record evidence to support the facts. The case is before the Court on Respondents' motions for summary judgment. Therefore, the record evidence is to be viewed in the light most favorable to Petitioners. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

hesitancy to "apply the *Heck* rule in such a way as would contravene the pronouncement of five sitting justices"); *Jenkins*, 179 F.3d at 27 (finding that applying the *Heck* rule under the circumstances would "contravene the pronouncement of five justices that some federal remedy – either habeas corpus or 1983 – must be available").

Moreover, although Respondents attempt to downplay the conflict by picking it apart case-by-case, the conflict between the circuits is not limited to the cases cited in the Petition and their particular facts. In cases involving the duration of confinement, the Second, Seventh, and Ninth Circuits all found that *Heck*'s favorable termination requirement did not bar 1983 actions by former prisoners who, because they were no longer in custody, did not have habeas relief available to them. *See Nonnette v. Small*, 316 F.3d 872, 877 (9th Cir. 2002); *Carr v. O'Leary*, 167 F.3d 1124 (7th Cir. 2002); *Huang v. Johnson*, 251 F.3d 65, 74-75 (2d Cir. 2001). And in *Leather v. Eyck*, 180 F.3d 420, 424 (2d Cir. 1999), in which the plaintiff was convicted of driving while impaired, and was fined but not imprisoned, the Second Circuit permitted the plaintiff to bring a 1983 action claiming he was subjected to selective prosecution. The court held *Heck* did not apply because the Petitioner was not, and never was, in custody. *Id.* These cases all conflict with the decision below and with the other cases cited in the Petition that hold that *Heck* bars 1983 actions that go to the fact or duration of conviction, even when habeas relief is not available to the plaintiff. *See Torres v. Fauver*, 292 F.3d 141, 145 n.5 (3d Cir. 2002) (acknowledging split between the circuits).

2. Because Respondents frame the conflict in the circuit courts as being over whether *Heck* barred 1983 actions that do not involve the fact or duration of the

underlying conviction, they contend that *Muhammad v. Close*, 450 U.S. 749 (2004), which held that *Heck* was not implicated by a prisoner's challenge that did not have consequences for the fact of conviction or duration of the sentence, resolved the conflict. *Muhammad*, however, did not answer the question presented here. To the contrary, in *Muhammad*, the Court specifically noted that "[m]embers of the Court have expressed the view that unavailability of habeas for other reasons may also dispense with the *Heck* requirement" but found that "this case is no occasion to settle the issue." *Id.* at 752 n.2. The present case provides the occasion to settle the issue left open in *Muhammad*.

3. In *Spencer v. Kemna*, five justices, four in concurrence and one in dissent, stated that the favorable termination requirement of *Heck v. Humphrey* does not bar a plaintiff who is not in custody from bringing a 1983 action. In their Brief in Opposition, Respondents attempt to distinguish the concurrences and dissent in *Spencer v. Kemna* on the ground that the petitioner in *Spencer* was challenging an order revoking probation, rather than conduct that implicated his underlying conviction. However, the five Justices who opined in *Spencer* that the petitioner could bring a 1983 action did not base their views on the fact that Spencer was challenging his parole revocation rather than his original conviction, but on the fact that because Spencer was no longer in custody, he did not have a remedy under the habeas statute. *Spencer*, 523 U.S. at 20-21 (Souter, J., concurring); *id.* at 25 n.8 (Stevens, J., dissenting). They believed that the favorable termination requirement does not apply if federal habeas relief is unavailable to a § 1983 plaintiff. Respondents do not dispute that federal habeas relief is unavailable to

§ 1983 plaintiffs, such as the plaintiffs here, who are convicted of a misdemeanor and sentenced to pay a fine only. Thus, according to the views expressed by the five Justices in the concurrences and dissent in *Spencer*, the plaintiffs in this case should have been able to bring a 1983 action to challenge respondents' unconstitutional actions.

4. Finally, Respondents' claim that *Wilkinson v. Dotson*, 544 U.S. 74, 125 S. Ct. 1242 (2005), settled "any ambiguity" about the "validity of *Heck*." However, the validity of *Heck* is not in question, and petitioners certainly do not challenge its application in many instances. Rather, the question is whether the favorable termination requirement in *Heck* applies when habeas is unavailable, an issue not addressed in *Wilkinson*. *Wilkinson* described *Heck* as barring a § 1983 action challenging the validity of a conviction by "a prisoner in state custody." *Id.* at 1245. It did not answer the question whether *Heck* applies if a person was not a state prisoner in custody when he or she filed the § 1983 action. Indeed, *Wilkinson* refers to the *Heck* line of cases as "the implicit habeas exception" to a § 1983 remedy, *id.* at 1248, suggesting that *Heck* may only apply when habeas relief is available.

Furthermore, the Court held in *Wilkinson* that "prisoners may bring their claims without fully exhausting state-court remedies so long as their suits, if established, would not necessarily invalidate state-imposed confinement," *Wilkinson*, 125 S. Ct. at 1249, and held that a state prisoner's § 1983 action for injunctive relief that did not necessarily challenge the validity of the prisoner's sentence was not barred by *Heck*. In the present case, the five convicted petitioners as well as the 14 petitioners who were not convicted sought injunctive relief from the prior

restraint by the Copiah County sheriff on their exercise of the First Amendment freedoms of speech, expression, and association. Any injunctive relief granted to them would not necessarily invalidate any misdemeanor convictions and therefore, under Wilkinson, those § 1983 claims should not be barred.

CONCLUSION

The petition for writ of certiorari should be granted, and the judgment and opinion of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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March 2006

(5)

No. 05-999

In The
Supreme Court of the United States

HOUSTON COLLINS, JR.; SHARLET BELTON COLLINS; ROBERT EARL COLLINS; VELMA JEAN COLLINS; DARRELL CALENDER; LARRY VALLIERE; GREGORY TOLLIVER; SHERMAN TOLLIVER; DWAYNE KEMP, CHRISTOPHER WONG WON, DETRON BENDROSS, BERNARD VERGIS, ASHLEY GRUNDY, and EDDIE YOUNGBLOOD, III, individually and a.k.a 2 Live Crew; TIMOTHY VINCENT YOUNG; PRISCILLA MORRIS; LUTHER JEFFERSON; LEE ESTER CRUMP; and LINDA CHRISTMAS,

Petitioners,

vs.

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Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BY HINDS COUNTY, MISSISSIPPI SHERIFF DEPARTMENT AND RANKIN COUNTY, MISSISSIPPI SHERIFF DEPARTMENT

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1. Respondents, the Hinds County, Mississippi Sheriff's Department and the Rankin County, Mississippi Sheriff's Department (the "Hinds and Rankin Respondents"), repeat the same argument as Respondents, Frank Ainsworth and the Copiah County, Mississippi Sheriff Department ("Ainsworth"), on the question concerning *Heck v. Humphrey*, 512 U.S. 477 (1994). Petitioners have already responded to this argument in their Reply to Ainsworth's Brief in Opposition. There is no need to respond further.

2. The Hinds and Rankin Respondents attempt to distinguish the facts in the present case from the facts in *Council for Periodical Distributors v. Evans*, 827 F. 2d 1483 (11th Cir. 1987). [Hinds and Rankin Respondents Brief in Opposition, pp. 9-15]. However, the seminal facts in the two cases are very similar. In the present case, although the Hinds County and Rankin County sheriffs were unaware of the illegal reason for the checkpoints, they knew that they were sending deputies to assist in roadblocks and checkpoints at a 2 Live Crew Concert. These sheriffs voluntarily sent deputies to assist with the checkpoints. Importantly, the deputies they sent were present and assisted Sheriff Ainsworth's deputies in shutting down the Concert before 2 Live Crew performed. (R. 1028-1029). In other words, the deputies loaned by the Hinds and Rankin Respondents participated in the prior restraint on the 2 Live Crew Concert. Ainsworth testified that he told the sheriffs from the other counties, including Hinds and Rankin, about the Concert and that he needed assistance to conduct the roadblocks and checkpoints. App. 58-60 to Pet. for Cert. In that regard, the facts in this case are not distinguishable from the facts in *Council for Periodical Distributors v. Evans*, supra.

3. The Hinds and Rankin Respondents argue that Petitioners are not entitled to a permanent injunction because they have not succeeded on the merits against them. [Hinds and Rankin Respondents Brief in Opposition, pp. 10-14]. The Fifth Circuit indicated in its earlier opinion that Petitioners will succeed on the merits against Sheriff Ainsworth if the record facts are viewed in their favor. *Collins v. Ainsworth*, 382 F. 3d 529 (5th Cir. 2004), App. 15-43 to Pet. for Cert. Petitioners only ask that any injunctive relief granted against Ainsworth apply to any other law enforcement officers who participated with him in the prior restraint. As the Eleventh Circuit held in *Council for Periodical Distributors v. Evans*:

> We note at the outset that the City and its police chief were appropriate defendants in the plaintiffs' suit to enjoin the prior restraint. A city police officer, assigned by the police chief's predecessor, was a member of the task force and was involved in a great deal of the groundwork in preparation for the illegal prior restraint. The officer, Corporal Brock, is mentioned repeatedly throughout the transcript of the hearings below. He was present at the meeting at which the magazine retailers were intimidated. Thus, it is without question that the district court appropriately included the City and its police chief in its injunction. Thus, even if they were only minor players, they were in fact players in the unconstitutional actions and were correctly enjoined from continuing those actions.

Id., at 1486. In that regard, Petitioners have shown a likelihood of success against Ainsworth and those who participated with him in the unconstitutional prior restraint.

4. The Hinds and Rankin Respondents also argue that money damages is the only appropriate remedy and would fully compensate Petitioners for any harm they are likely to suffer in the future if an injunction does not issue and Respondents refuse to allow future concerts to occur. That is not so. Injunctive relief is an appropriate remedy for prior restraint activities by public officials. See, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

5. Finally, the Respondents argue that they are entitled to damages because Petitioners' petition for writ of certiorari is frivolous. It is not. It raises two important issues which should be resolved by this Court. This case does not involve a frivolous appeal. The case presents justiciable questions for review. Therefore, it is not frivolous and damages should not be assessed against Petitioners. Compare, *Austin v. United States*, 513 U.S. 5 (1994) (*per curiam*).

CONCLUSION

The petition for writ of certiorari should be granted, and the judgment and opinion of the United States Court of Appeals for the Fifth Circuit should be reversed.

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